132

150 U S ~~362~~

RECORD, CASE No. 14,435.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~623~~ 362

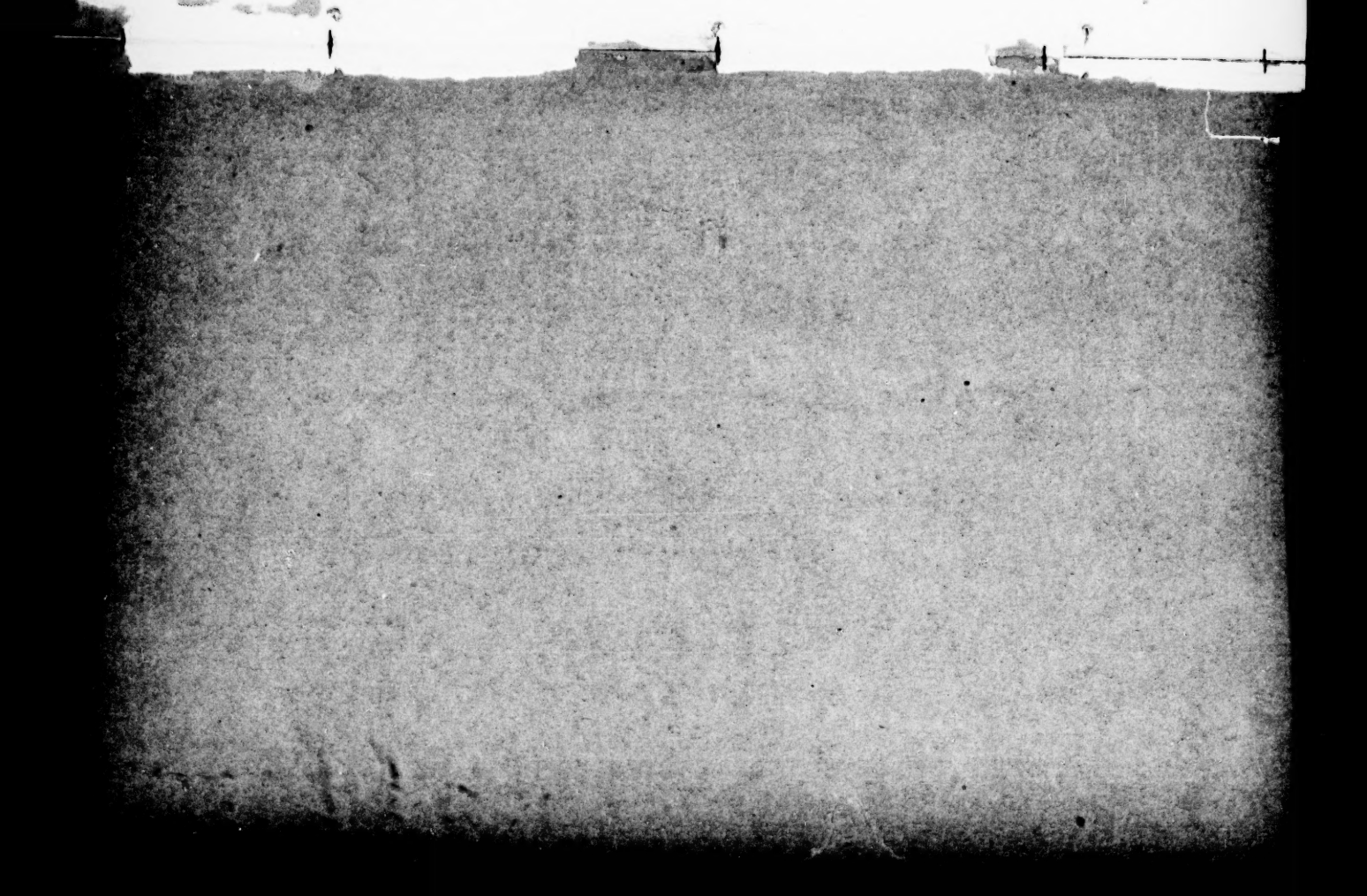
REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, AND REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER, AND IRVING MILLER, HEIRS OF D. B. MILLER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES; W. J. VANKIRK, JOHN N. JENKINS, E. A. TAYLOR, AND JULIA B. BERRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED DECEMBER 4, 1890.



RECORD, CASE No. 14,435.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 623.

REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, AND REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER, AND IRVING MILLER, HEIRS OF D. B. MILLER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES; W. J. VANKIRK, JOHN N. JENKINS, E. A. TAYLOR, AND JULIA B. BERRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Jefferson chancery court	1	1
Order filing motion to amend bill	1	1
Order to amend bill, &c.	2	1
Amendments to bill	2	2
Motion to retake testimony	5	3
Order granting leave to take further testimony, &c.	5	4
Answer of Swann and Billups, trustees	6	4
Agreement as to submission	10	6
Agreement as to evidence, &c.	10	7
Agreement as to evidence	12	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1893.

	Original.	Print.
Minute entry of submission	15	10
Deposition of Daniel J. Duffy	17	11
Deposition of J. C. Stanton	27	17
Exhibit A #2—Letter, Thayer to Duffy, August 26, 1870	35	22
B #3—Letter, Thayer to Duffy, Sept. 14, 1870	35	22
Deposition of Albert F. Thayer	36	23
Exhibit 1—Minutes of Wills Valley R. R. Co.	45	28
2—Letter, Thayer to Duffy, August 26, 1870	57	37
3—Letter, Thayer to Duffy, September 14, 1870	58	37
Decree of November 12, 1888	58	38
Agreement as to record on appeal	59	38
Security for costs on appeal	61	39
Notice of appeal	61	40
Register's certificate	62	40
Bill of complaint	63	43
Exhibit A—Entry taker's certificate No. 30, A. & C. R. R. to Joab Bagley, September 13, 1870	78	50
B—Entry taker's certificate No. 257, A. & C. R. R. to Joab Bagley, January 24, 1871	79	51
C—Deed, Joab Bagley *et ux.* to McKee, Fuller & Co., January 27, 1871	81	52
D—Deed, Joab Bagley *et ux.* to McKee, Fuller & Co., October 7, 1871	83	54
E—Deed, James H. McKee *et al.* to The Jefferson Iron Co., January 10, 1873	85	55
G—Deed, The Jefferson Iron Co. to D. B. Miller, November 9, 1874	87	57
H—Deed, The Jefferson Iron Co. to D. B. Miller, March 10, 1880	93	61
I—Deed, The A. & C. R. R. Co. to the State of Alabama, March 2, 1870	100	65
Security for costs	105	68
Affidavit of non-residence of John Swann, &c.	105	68
Answer of Swann & Billups, trustees	106	69
Exhibit 20—Deed, governor of Alabama to Swann and Billups, trustees, February 8, 1877	115	75
Answer of John N. Jenkins *et al.*	121	78
Decree *pro confesso* against Ellis Phelan	122	79
Exhibit B to Duffy's Deposition—Entry taker's certificate, A. & C. R. R. to Joab Bagley, January 24, 1871	122	79
Exhibit A to Duffy's Deposition—Entry taker's certificate, A. & C. R. R. to Joab Bagley, September 13, 1870	124	80
Deposition of Daniel J. Duffy	125	81
Exhibit C to Duffy's Deposition—Proceedings of board of directors A. & C. R. R. Co., January 26, 1869	139	90
Agreement as to appointment of commissioner	139	90
Commission to take testimony	140	91
Deposition of D. N. Stanton	141	91
John C. Stanton	148	96
John Demerritt	156	101
Anthony Beers	163	105
Exhibits A and B (Beers)—Checks of Beers, April 7, 1881, and June 19, 1882	168	109

	Original.	Print.
Deposition of Ellis Phelan	169	109
Bayliss E. Grace, Sr.	179	116
Exhibit C (Phelan)—Deed, Miller *et ux.* to Phelan, July 16, 1883	183	118
Exhibit D (Phelan)—List of lands set apart to A. & C. R. R. Co.	185	120
Exhibit E (Phelan)—Certified copy of list No. 19, &c.	188	121
Commission to take testimony	192	124
Deposition of James Thomas	193	125
Commission to take testimony	201	130
Deposition of George Massey	202	131
Ephraim Murphy	209	135
James E. Hawkins	211	136
L. H. Scruggs	213	138
Exhibit No. 1 (Scruggs)—List of lands set apart to A. & C. R. R. Co.	218	141
No. 2 (Scruggs)—List of lands set apart to A. & C. R. R. Co.	220	142
Deposition of W. F. Hanby	222	143
Certified record from probate court of Jefferson county in matter of Bagley estate	227	146
Report of insolvency	228	147
Decree of insolvency	231	149
Petition for sale of real estate	232	149
Order for sale	236	152
Agreement as to bankruptcy of A. & C. R. R. Co.	236	152
Certified copy of writ of ejectment in Swann *et al. vs.* Morrow *et al.*	237	153
Complainant's objections to evidence	240	155
Commission to take testimony	241	155
Deposition of F. Y. Anderson	242	157
Exhibit A—Commissioner's lists, A. & C. R. R lands	248	160
B—List No. 19	262	167
C—Application for land by Phelan, June 30, 1881	266	170
D—Application for land by Randolph, July 9, 1881	267	170
E—Agreement of Randolph, July 18, 1881, &c.	268	171
Deposition of Robert Goode	269	172
Mrs. M. J. Kilgore	272	174
Henry Morrow	276	177
Richard C. Bearden	285	182
W. F. Nabers	289	185
Pleasant Watkins	292	187
George B. Randolph	299	191
Exhibit A—Letter, Phelan to ——, July 28, 1883	307	197
Letter, Phelan to ——, July 26, 1883	307	197
Letter, Phelan to Randolph, July 23, 1883	308	198
B—Letter, Randolph to Phelan, July 27, 1883	309	198
Letter, Randolph to Phelan, July 25, 1883	310	199
E—Agreement of Randolph, July 18, 1881	311	200
Commission to take testimony	312	200
Deposition of John J. White	313	201
Exhibit A (White)—Application for land by Phelan, June 30, 1881	318	204
Deposition of Henry L. Wheeler	319	205
John N. Jenkins	324	209
W. H. Hunter	330	213

	Original	Print.
Exhibit A—Letter, Randolph to Thompson & Hunter, December 4, 1882	334	215
Deposition of E. L. Milner	334	216
Certified record of Swann and Billups *vs.* O'Bar	339	219
Summons	339	219
Complaint	339	219
Sheriff's return	341	221
Alias summons	342	221
Complaint	342	221
Sheriff's return	344	222
Judgment	344	222
Writ of possession	345	223
Sheriff's return	345	223
Clerk's certificate	346	223
Commission to take testimony	346	224
Entry taker's certificate No. 80, A. & C. R. R. to Bagley, September 13, 1870	347	225
Entry taker's certificate No. 257, A. & C. R. R. to Bagley, ——, ——	349	226
Commission to take deposition of J. C. Stanton	351	227
Deposition of J. C. Stanton in case Swann *et al. vs.* Curry *et al.*	352	228
Order to publish testimony and setting cause for trial	356	231
Stipulation as to testimony	357	231
Minute entry of submission	357	231
Note of testimony	358	232
Opinion	360	233
Decree, June 20, 1885	364	236
Petition for appeal	365	236
Order fixing amount of appeal bond	366	237
Appeal bond	367	237
Register's certificate to record	368	238
Order granting leave to revive suit	369	239
Order submitting motion to revive suit	370	239
Argument and submission	370	240
Final decree	371	240
Opinion	372	240
Bond	378	244
Writ of error (copy)	379	245
Citation (copy)	382	246
Clerk's certificate	384	247
Writ of error	385	247
Citation	388	248
Proof of service of citation	389	249
Assignment of errors	390	249

1 The Supreme Court of the State of Alabama, November Term, 1889.

TUESDAY, *November 5th*, 1889.

Be it remembered that a regular term of the Supreme Court of the State of Alabama was begun and holden according to law at the capitol, in the city of Montgomery, on Tuesday, the fifth day of November, A. D. eighteen hundred and eighty-nine, it being the first Tuesday of the said month.

Present and presiding as justices of the said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice; Hon. Thomas N. McClellan, associate justice.

Be it remembered that in the cause of D. B. Miller *vs.* Swann & Billups *et al.*, in this court, the following proceedings were had, to wit:

D. B. MILLER *vs.* SWANN & BILLUPS *et al.* } Minute Entry, Monday, Nov. 7th, 1887.

This cause coming on to be heard at this term of the court, complainant files his motion to amend the original bill in this cause, and the same is ordered by the court to lie over one day under the rules.

2 D. B. MILLER *vs.* JOHN SWANN, Trustee, *et al.* } Minute Entry, Tuesday, Nov. 8th, 1887.

This cause coming on further to be heard on the motion of complainant filed on a former day of this term and ordered to lie over one day under the rules and all parties being represented by their respective solicitors and said motion being argued and duly considered by the court, it is ordered, adjudged, and decreed that said motion be allowed and complainant be, and he is hereby, allowed to amend his bill as set forth in the motion to amend bill heretofore filed, on, to wit, the 7th day of November, 1887, and said bill is hereby amended in open court, as per amendment set out in said motion.

It is further ordered that complainant pay the costs of this amendment, and, further, that defendants have ninety days in which to file answers to the amended bill. It is further ordered by the court that this cause be, and the same is hereby, continued to next term of this court.

D. B. MILLER
vs.
JOHN SWANN *et al.* } Amendments to Bill.

Complainant, D. B. Miller, moves the court to be allowed to amend his bill in the case of D. B. Miller *vs.* John Swann and John A. Billups *et al.* in the following particulars, viz:

Amend by additional paragraph to follow immediately after paragraph 3 and to be numbered paragraph 3½, as follows:

Paragraph 3½. Orator further charges on information and belief and so avers that at the date of the sales of the lands made to the said Joab Bagley by the Alabama & Chattanooga Railroad
3 Company, as set forth in the above paragraphs 2 and 3, the said Alabama & Chattanooga Railroad Company had completed its road from its eastern terminus, viz., Wauhatchie, Tenn., to a point in Jefferson county, Alabama, opposite to and beyond the said lands towards the Mississippi line, in the direction of Tuscaloosa, Alabama, and trains were running on said road from its said eastern terminus to said point opposite to and beyond said point where said lands are situate, carrying passengers and freight, and afterwards, viz., on the 17th May, 1871, the said Alabama & Chattanooga Railroad Company completed its railroad and trains were running thereon throughout its entire length, carrying passengers and freight; and complainant further charges on information and belief and so avers that the said contracts of sale aforesaid, as set forth in paragraphs 2 and 3 above, made by the said Alabama & Chattanooga Railroad Company to the said Joab Bagley were made in accordance with the act of Congress granting the same, and at the date of said contracts of sale as aforesaid the requirements of said act had been complied with in all essential parts in such manner as to authorize the said contracts of sale by the said Alabama & Chattanooga Railroad Company; and, if complainant is mistaken in the averment that the said contracts of sale were made in accordance with the said act of Congress, meaning thereby a strict compliance with the letter of said statute, complainant avers and charges that said contracts of sale were made according to the true intent and spirit of said statute, and since the completion of said road, viz., on the 17th May, 1871, said contracts of sale have been fully ratified and confirmed by the said railroad company, the State of Alabama, and the said John Swann and John A. Billups, and no action of the United States Government, either through its legislature or through its judiciary, has ever been taken to procure or have a declaration of forfeiture on account of any irregularity in the said sales to Bagley (if there were any) or for other cause.

4 And complainant asks to be allowed to make the following amendment:

Amend by striking out the whole of paragraph 12 and insert in lieu thereof the following:

Paragraph 12. And orator further charges on information and belief and so avers that the said Joab Bagley died in Jefferson

county in the year 1875 and his estate was administered in the probate court of said county. The said Bagley, as orator is informed and believes and so charges, made payments to the said Alabama & Chattanooga Railroad Company on his notes given for the purchase-money of said lands, but how much he paid orator does not know. Orator has been furnished with a letter written by the said Danel J. Duffy (who was then the duly authorized agent of said Alabama & Chattanooga Railroad Company) on or about the 10th February, 1873, which states that there was a balance of one hundred and five dollars (105) due for said lands, and orator alleges and shows that the said notes were on or about the — day of ——, 18—, filed by the said Swann & Billups in the probate court of Jefferson county, Alabama, as claims against the said estate of Joab Bagley, and efforts made by them to collect said notes, and orator alleges that no steps have ever been taken to enforce any lien upon the said lands for the payment of the purchase-money of said lands, nor has orator ever been called on to pay said notes or the amounts due thereon. Orator has always been willing and able to pay whatever amounts might be due on said notes, and is now ready, able, and willing to pay said amounts whenever the same is ascertained.

3d amendment. Strike out the words in paragraph 13, page 11, "why no deed was made upon the full payment of the said purchase-money orator is not informed, but so it is."

5 D. B. MILLER *vs.* JOHN SWANN, *Trustee, et al.* } Motion to Retake Testimony.

Comes the complainant, by his solicitors, and moves the court to be allowed to retake the depositions of John C. Staunton, D. N. Staunton, and Daniel J. Duffy, and in support of said motion says that there are facts material to the issue involved in this litigation and which were not brought out in the former examinations of said witnesses and which can only be proved by the depositions of the said witnesses, and of this complainant had no knowledge or notice until the depositions of the said witnesses were taken.

2d. That the averments contained in the amendments to the bill allowed at this term complainant expects to prove by the evidence of the said witnesses, and these facts came to the knowledge of complainant since the depositions of said witnesses were taken; therefore he prays for an order to re-examine said witnesses.

WATTS & SON AND JOHN PHELAN,
Sol's for Complainant.

To S. F. Rice, Esq., sol. for all defendants except Phelan.

D. B. MILLER
vs.
JOHN SWANN, *Trustee, et al.* } Minute Entry.

This cause coming on to be heard, on motion of complainant, to retake depositions of John C. Staunton, D. J. Duffy, and D. N. Staunton and to take additional testimony to prove his amended bill, and being duly considered by the court, it is ordered by the court that both parties to this suit have leave to take additional testimony after the time for filing of answers to the amended
6 bill or after answers are filed; and it is further ordered by the court that complainant have leave to re-examine D. J. Duffy, Jno. C. Staunton, D. N. Staunton, and Albert E. Thayer on points upon which they have not been examined.

It is further ordered by the court that this cause be, and the same is hereby, continued to the next term of this court.

D. B. MILLER
vs.
JOHN SWANN *et al.* } Answer to the Amended Bill.

The answer of John Swann and John A. Billups, trustees, to the bill of complaint filed against them and others in the office of the register of the chancery court of Jefferson county, Alabama, on the 15th day of July, 1884, by D. B. Miller, as amended by the amendment to said bill filed by complainant in said chancery court on the 7th day of November, 1887.

These defendants, said Swann and Billups, trustees, answering said bill and said amendment thereto, here and now adopt as part of this answer the answer to said bill filed by them in the office of said register on the 11th day of October, 1884, and they here and now adopt and reiterate the denials and averments, pleas, and other matters appearing in said answer filed by them (on October) 11th day of October, 1884, as the same appears in said answer now on file in said cause and now again filed by these defendants, with the additional denials, averments, statements, pleas, and other matters hereinafter appearing in this answer to said bill and the said amendment thereto. These defendants deny that the Alabama & Chattanooga Railroad Company made any or either of the sales of the lands particularly described in paragraphs 2 and 3 of said original bill, as alleged in said bill.

7 These defendants deny that said Bagley mentioned in said bill ever bought from the Alabama & Chattanooga Railroad Company or from any agent of said company authorized in writing to sell any of said lands particularly described in said paragraphs 2 and 3 of said original bill. These defendants deny that said Bagley ever paid any money or thing of value to the Alabama & Chattanooga Railroad Company for or on account of any of said last-mentioned lands. These defendants deny that any authority

in writing was ever given by the Alabama & Chattanooga Railroad Company to said Daniel J. Duffy or to said J. C. Staunton or to any other person to sell any of the said lands particularly described in said paragraphs 2 and 3 of said original bill. These defendants deny each and every allegation made or contained in said paragraph 3½ (that paragraph 3½ being part of said amendment to said original bill).

These defendants deny that said alleged contracts of sale mentioned in said paragraph 3½ or either of them have ever been made, ratified, or confirmed by the Alabama & Chattanooga Railroad Company or by the State of Alabama or by these defendants. These defendants deny that complainant at the filing of his said bill was the owner of any part of the lands particularly described in paragraphs 2 and 3 of his said bill or entitled to any relief in this suit. These defendants plead and aver that at the time (that is, February 8th, 1877) when the State of Alabama, by its then governor, George S. Houston, executed to these defendants the conveyance or deed a copy of which is set forth as Exhibit 20 and made a part of the said answer of these defendants to said original bill these defendants never had had any notice of the alleged claims of complainant or of said Bagley or of said alleged sales to said Bagley. The State of Alabama as well as these defendants were without any notice of the claims or rights of said Bagley or of complainant or of said alleged sales to said Bagley at the time of the execution of said conveyance by said State, by its said governor, to these defendants.

8 These defendants continued to be without notice of said alleged sales to said Bagley or of the alleged circumstances relating to them until the filing of the said original bill in this cause, and have never ratified or confirmed said alleged sales, and have never intended to ratify or confirm them. These defendants deny each and every allegation contained or made in that part of said amendment to said original bill which is set forth as paragraph 12 of that amendment. These defendants plead and rely on the statute of limitations of two years embodied in section 5057 of the Revised Statutes of the United States as a bar to any relief to complainant in this suit. These defendants plead and rely on the statute of limitations of ten years of Alabama as a bar to any relief to complainants in this suit. These defendants plead and rely on lapse of time and laches of complainant and of those under whom he claims as a bar to any relief to complainant in this suit. These defendants deny each and every allegation contained in said original bill or in said amendment thereto which is not expressly or by inevitable implication admitted in this answer. Since these defendants filed their said answer to said original bill these defendants have discovered and therefore they now and here plead and aver that the purchase alleged in paragraphs 9 and 10 of said original bill to have been made by complainant, as set forth in said paragraphs 9 and 10 of his said original bill, was not made as alleged in those paragraphs, but was made not for himself only, but made for the benefit of certain stockholders of said Jefferson Iron Company, whose names are unknown to these defendants, but known to

complainant, and who had paid off said mortgage before the purchase thereunder. Complainant did not by said purchase under said mortgage become the sole owner of any claim or right to the land so purchased under that mortgage, but made that purchase entirely for the benefit of the said stockholders last above referred to.

9 And now, having fully answered said bill as amended, these defendants demur to said bill as amended and assign and specify each of the grounds of demurrer to said original bill set forth in their answers to said original bill, and these defendants also specify and assign the following additional grounds of demurrer to said bill as amended:

8. Said bill as amended shows that complainant is barred by lapse of time and laches.

9. Said bill shows that complainant is barred by laches of himself and those under whom he claims.

10. Said bill shows no compliance with the said acts of Congress of June 3d, 1856, and April 10th, 1869, no compliance with the said act of the legislature of Alabama of February 11th, 1870, or with the special power of sale disclosed in said mortgage to the State of Alabama.

11. Said bill as amended shows, what is really a fact and what these d-fendants here aver to be a fact, that the particular lands as to which complainant here seeks relief is no part of the first one hundred and twenty sections which the said acts of Congress authorized to be sold in advance of the construction of any part of the railroad.

JOHN SWANN & JOHN A. BILLUPS,
By their sol's, RICE, HEWITT, WALKER & PORTER AND SMITH.

On the foregoing is endorsed: "Filed in office this 30th day of Dec., 1887. Chas. A. Senn, register."

10 D. B. MILLER *vs.* SWANN & BILLUPS. } # 649. Agreement of Counsel as to Submission.

In this case it is agreed that the cause be submitted for decree in vacation, note of submission to be made on the 15th day of July, 1888, and each side to furnish briefs.

June 30th, 1888.

SMITH & LOWE,
Sol's for Respondents.
JOHN PHELAN,
Sol. for Complainant.

On the foregoing is endorsed: "Filed in office this 30th day of June, 1888. Chas. A. Senn, register."

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.* } Agreement of Counsel.

To avoid delay, save costs, and obtain a trial on legal evidence the undersigned solicitors of the respective parties agree as follows: 1st. That every portion of the evidence in this cause to which any sufficient legal objection could have been made shall be deemed and taken to have been duly objected to and to have been excluded or suppressed, if the court decides the same ought to have been excluded or suppressed, and shall not be considered as evidence by any court, either of original or appellate jurisdiction, in trying this case. 2nd. That the deposition of Jeremiah Richards shall be deemed to have been duly taken and published in this cause
11 and as containing the following testimony of said Richards, duly sworn to by him and duly returned as his testimony given in such deposition in this cause, to wit:

I, the said Jeremiah Richards, was for several years the secretary of the Alabama & Chattanooga Railroad Company. I was the successor of A. F. Thayer, the previous secretary of that company; as such secretary I had the custody of the minute book in which were entered the proceedings and actions of that company, and said minute book was in my possession as late as October, 1877. Between 1869 and October, 1877, I frequently examined the contents of said minute book and I remember examining said minute book particularly to discover what authority therein appeared to have been given to J. C. Staunton, who was the general superintendent during the entire time of building the road of said The Alabama & Chattanooga Railroad Company, and upon such examination carefully made by me of all things appearing in said minute book the only authority set forth in that book as given to said J. C. Staunton is set forth in said minute book in the following words and figures:

"BOSTON, *January 26th*, 1869.

At a meeting of the board of directors of the Alabama & Chattanooga Railroad Company held this day it was voted that the general superintendent have entire charge of building and equipping the railroad, with power to buy all materials and make all contracts incident thereto, and that all employees of said company shall be under his charge and subject to his orders, with power to dismiss whenever he may deem it for the best interest of the road to do so."

This 12th July, 1888.

WATTS & SON AND
JOHN PHELAN,
Sol's for Complainant.
RICE & WILEY,
Sol's for Defendants.

12 In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILUPS *et al.*

It is further admitted and agreed by the solicitors of the respective parties in said cause as follows, to wit:

1. That D. J. Duffy, under and by virtue of the same authority by which the lands in this suit were sold to Joab Bagley, did, on the 7th day of September, 1870, make three (3) sales to different parties of the lands included in the grant of Congress mentioned in the bill on the line of said A. & C. R. R. and at a point more than thirty miles from Elyton, Ala., and in a northeasterly direction therefrom and in the direction of Chattanooga, Tenn.

2. That the following certificates, being certified copies from the Secretary of the Interior, are the only certificates ever filed in the office of the Secretary of the Interior by any governor of Alabama as to the completion of any part or parts of either the Alabama & Chattanooga railroad, the Wills Valley railroad, or the Northeast & Southwest Alabama railroad, viz:

(4–207*a*.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October 11th*, 1888.

I, T. J. Anderson, acting Commissioner of the General Land Office, do hereby certify that the annexed copies, being two certificates of the governor of Alabama—first, the completed section of twenty continuous miles of the Northeast and Southwestern rail-
13 road, made January 30th, 1866; second, the completed section of twenty continuous miles of the Wills Valley railroad, made February 12th, 1866—are true and literal exemplification- of the original certificate- now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of the office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Signed) T. J. ANDERSON,
Acting Commissioner of General Land Office.

Hon. James Harlan, Secretary of the Interior, Washington, D. C.

SIR: Pursuant to the 4th section of an act of Congress entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, approved June 3d, 1856," I hereby certify that more than twenty continuous miles of Northeast and Southwestern railroad are completed. That part of the road which is completed commences at Meridian, Miss., and extends northeasterly in the direction of Gadsden, in Cherokee county, Ala.

In section six of the act above recited the said road is mentioned as one entitled to alternate sections of public lands.

In witness whereof I have hereunto set my hand and caused to be affixed the great seal of the State this the 30th day of January, A. D. 1866, and the Independence of the United States of America the ninetieth year.

[SEAL.] R. M. PATTON,
Governor of Alabama.

By the governor:
ALBERT ELMORE,
Secretary of State.

14 Hon. Jas. Harlan, Secretary of the Interior, Washington, D. C.

SIR: Pursuant to the 4th section of an act of Congress entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, approved June 3d, 1856," I hereby certify that twenty continuous miles of the Wills Valley railroad are completed. That part of the road which is completed commences at Chattanooga, Tenn., and extends southwestwardly in the direction of Gadsden, in Cherokee county, Alabama.

In section six of the act above recited the said road is mentioned as one entitled to alternate sections of public lands.

In witness whereof I have hereunto set my hand and caused to be affixed the great seal of the State this the 12th day of February, A. D. 1866, and the Independence of the United States of America the ninetiet- year.

R. M. PATTON,
Governor of Alabama.

By the governor:
ALBERT ELMORE,
Secretary of State.

3. That the Alabama & Chattanooga railroad was completed and had cars running on its road from Chattanooga, Tenn., up to Elyton, Ala., on the 13th September, 1870, the said road from Elyton, Ala., to the Mississippi State — being unfinished.

WATTS & SON AND JOHN PHELAN,
Sol's for Complainants.

15 SAMUEL F. RICE AND SMITH & LOWE,
Sol's for Swann & Billups, Trustees, and All Def'ts Represented by Them.

On the foregoing is endorsed: "Filed 14th July, 1888. Thomas Cobbs, chancellor."

D. B. MILLER
vs.
JOHN SWANN, Trustee, *et al.* } Minute Entry, July 14th, 1888.

This cause, coming on to be heard, was submitted for decree in vacation upon the pleadings and proof noted by the register, to wit, on behalf of the complainant upon—

1. Bill and exhibits thereto and amendments to bill.

2. Exhibits to answer of defendants (Gov. Houston's deed to John Swann and John A. Billups, trustees, &c.).

3. Depositions of D. J. Duffy, J. C. Staunton, John Demerrit, Ellis Phelan, Anthony Beers, Bayles E. Grace, Sr., James Thomas, George Massey, James E. Hankins, Ephraim Murphy, L. H. Scruggs, W. F. Hanby, Albert F. Thayer.

4. Deposition- of D. J. Duffy and J. C. Staunton taken on re-examination.

5. Transcript from probate court of Jefferson county, Alabama, in the matter of insolvency and petition for sale of lands of estate of Joab Bagley.

6. Acts of the legislature of Alabama incorporating the Northeast and Southwest Alabama Railroad Company and the Wills Valley Railroad Company, and also all acts relating to the Alabama & Chattanooga Railroad Company mentioned or referred to in the bill or answer, and also the following acts of the legislature of Alabama:

16 (1.) Acts of Alabama passed October 6th, 1868. (Pamph. Acts, pp. 207, 208, and 209.)

2. Act passed Nov. 17th, 1868. (Pamph. Acts, 1868, pp. 345, 346, 347, and 348.)

3. Act passed Dec. 12th, 1853. (Pamplr. Acts, 1853–'4, p. 270.)

4. Acts 1851–'2, p. 178, incorporating Wills Valley Railroad Company.

5. Acts of 1869–'70, pp. 89, 90, 91, and 92.

6. Acts of 1875–'6, p. 130.

7. Acts of 1883, pp. 62, 63, 64, 65, and 66.

8. Joint resolution of legislature of Alabama approved January 30th, 1858. (Acts of 1857–'8, p. 430.)

9. Decree *pro confesso* against defendant Ellis Phelan.

10. Agreements of counsel.

11. Certified copy of writ of ejectment from circuit court of Jefferson county, Ala., in the case of Doe *ex dem.* State of Alabama, John Swann, and John A. Billups *vs.* Lawson Morrow and George B. Randolph.

12. Acts of Congress donating the lands in dispute.

In behalf of defendants this cause is submitted upon demurrers and answers of the defendants John Swann and John A. Billups to the original bill and the answers of all the other defendants except Phelan, and upon the demurrers and answers of said John Swann and John A. Billups to the bill as amended and the amendment to the bill, and upon motion of said Swann and Billups

to dismiss for want of equity the bill of complaint so far as it seeks relief as to the southeast quarter of the southeast quarter of section one, township eighteen, of range three west, Jefferson county, Alabama, and upon the following evidence: Depositions of Robert Goode, M. M. J. Kilgore, Henry Morrow, Richard C. Bearden, W. F. Naber, Pleasant H. Watkins, Geo. B. Randolph, John N. Jenkins, F. Y. Anderson, John J. White, E. L. Milner, H. L. Wheeler, and W. H. Hunter; also on agreement of counsel filed in the cause on May 26th, 1885, and on agreement of counsel filed in this
17 cause on July 13th, 1888, and argued July, 1888, and upon the Deed Book, volume 21, pp. 498, 499, 500, and 501, belonging to the office of the judge of probate of Jefferson county, and in which deeds were recorded in that office; deposition of J. C. Stanton taken in an action of ejectment in the circuit court of Jefferson county, Alabama, wherein said Swann & Billups were plaintiffs and James A. Curry, J. F. B. Jackson, and J. M. Hagood were defendants; the last-mentioned deposition was taken by W. L. Eakin, as commissioner, on 7th April, 1880, and returned by him, the said commissioner, to said circuit court and filed therein.

In the Chancery Court of Jefferson County, Ala., at Birmingham.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Interrogatories to be propounded to Daniel J. Duffy, who resides at Chattanooga, Tenn., whose deposition when taken will be offered in evidence for the complainant on the trial of said cause.

Int. 1. Are you the same D. J. Duffy who was examined heretofore in this cause as a witness before C. P. Goree, commissioner?

To the 1st i-terrogatory he saith: I am the same Daniel J. Duffy who was examined as a witness before C. P. Goree, commissioner, on or about the 17th day of January, 1885.

Int. 2. State whether or not, at the time of your appointment as the land commissioner of the Alabama & Chattanooga railroad, as detailed by you in your said examination, you knew or were familiar with *what* part of the line of the said A. & C. R. R. constituted the old Wills Valley R. R. and *what* part the old Northeast and
18 and Southwest Alabama railroad. If so, tell the termini of the said Wills Valley R. R. and of the said Northeast & Southwest Alabama R. R. When you took charge of the said land department tell whether or not any of the said lands granted by the acts of Congress of June 3d, 1856, and April 10th, 1869, that lay on or near that part of the line of the said Ala. & Chattanooga R. R. which heretofore constituted the line of the said Northeast & Southwest Ala. R. R. had been sold prior to any grading or building of any part of said N. E. & S. W. Ala. R. R. If so, to whom and when and on what part of said line, and tell whether or not any sales of said lands were made by you as such land commissioner on that

part of the said A. & C. R. R. that formerly constituted the line of the said Northeast & Southwest Alabama railroad. If you say you did sell part of said lands, then tell on what part of the said line you first began to sell; to whom did you make the first sale or sales, and when, and exactly, as near as you can tell, the point on or near said line it was, and explain, if you can, how and why it was the said sales were made there first.

To the 2nd interrogatory he saith: I was at the time of my appointment as land commissioner or agent familiar with all parts of the located line of the Alabama & Chattanooga railroad, and especially those portions constituting the Wills Valley and the Northeast & Southwest Ala. R. R's. The termini of said Wills Valley R. R. was by virtue of three charters—one from the State of Alabama, one from the State of Georgia, and one from the State of Tennessee—which made its northern terminus Chattanooga, Tenn., and its southern terminus, by virtue of its Alabama charter, was some point on the Alabama & Tenn. River railroad near the farm of James Hampton. The Northeast & Southwest Ala. railroad had its southern terminus by virtue of two charters—one from the State of Alabama and one from the State of Mississippi—which fixed the south-
19 ern terminus at Meridian, Mississippi, with a view to connect with the Mobile & Ohio R. R., and the northern terminus to connect with railroads leading to Knoxville, Tennessee, the road to run through Elyton, Jefferson county, Ala., in a northeasterly direction. I am not aware of any sales having — made prior to any grading or the building of said Northeast & Southwest Ala. R. R. Some portion of said Northeast & Southwest Ala. R. R. had been graded and some portion built and operated prior to the late war, but after the consolidation of the Northeast & Southwest Ala. R. R. with the Wills Valley R. R., by acts of the legislature of Alabama, in 1868, and the revival and renewal of the grants of Congress of June 3d, 1856, granting lands to each of said railroads, and prior to my assuming the duties of land agent, my predecessor had sold and contracted the sale of lands at or near Elyton, Jefferson Co., Alabama, which sales were carried out, if not completed, by me as such land agent. Not having the books and papers before me, I cannot give the names of the parties to whom sales were made, but I recollect amongst them the names of W. S. Earnest, Joab Bagley, and Cephias Fenton. This was in the summer of 1870, and the agent making said sales was named B. P. Belknap. After my appointment and before the road was completed I made sales in the same vicinity, to wit, near Elyton, Alabama, as land agent. I remember making sales to Joab Bagley, Thomas Peters, and others, whose names are not now remembered, not having the books and papers before me. The first sale was made shortly after my appointment as land agent, early in September, 1870, and I think this sale was made to Joab Bagley and the land sold was a few miles from Elyton, Ala., and within the six-mile limit of the grant by Congress of said lands. The reasons for the sales being made at or near Elyton was that a railroad known as the South & North Ala. R. R. was building in the direction of Decatur, Ala.,

and was to pass by or near Elyton. This railroad had not had its land grant renewed or revived by Congress, and it
20 was held and claimed by the officers of the Alabama & Chattanooga Railroad Company that by virtue of its purchase of the Northeast & Southwest Ala. R. R. and the revival of the grant relating or pertaining to that road by act of Congress of April 10th, 1869, they have a right to make the selection of the first one hundred and twenty sections on behalf of said Northeast & Southwest Ala. R. R. for the benefit of said Ala. & Chatta. R. R. Co. at such point along the line of said Northeast & Southwest Ala. R. R. as the said Ala. & Chatta. R. R. Co. might select, and they did elect to locate said one hundred and twenty sections with Elyton, Ala., as the centre, and I was directed by the officers of said Ala. & Chatta. R. R. Co. to make sales accordingly, and I did so.

Int. 3. In answer to direct interrogatory No. 3 in your said prior examination you say you were appointed land commissioner or agent by J. C. Stanton, general superintendent and agent of the Ala. & Chatta. R. R. Co., for the sale of its lands, and that said appointment bears date September 3d, 1870. Now, tell whether or not the said railroad was then completed (to wit, the 3d September, 1870) to Elyton, Alabama. If you answer it was not, then explain why is it that you as such land commissioner made a sale of said lands on September 13th, 1870, to Joab Bagley, when you knew or ought to have known from the said acts of Congress of June 3d, 1856, and 10th of April, 1869, that you had no authority to make such sales beyond the completed part of the said railroad. Explain this fully and particularly.

To the 3rd interrogatory he saith: The explanation and reason are given in my answer to interrogatory 2 above. The road was not completed at that time to Elyton. My recollection is that the road was built to Trussville or a little below at that time, to wit, Sept. 13th, 1870. I may mention as another reason why they selected to sell the land with Elyton as the centre was that by such selection, if made before any renewal grant to the South &
21 North Ala. R. R. Co., the Ala. & Chatta. R. R. Co. would acquire all the lands so selected at the crossing of the two railroads. This was fully discussed by the officers of the Ala. & Chatta. R. R. Co. at Chattanooga, Tenn., the discussion being had by and between J. C. Stanton, general superintendent; Thos. J. Carlisle, his secretary; Robert Cranath, his chief engineer; B. P. Belknap, the land agent of the A. & C. R. R. Co., and David M. Key, its attorney, and myself, and it was done under the advice of said David M. Key, said attorney for the road.

Int. 4. State whether or not you had about the time of your appointment as such land commissioner or was there any evidence by which the public could have known that you were the land commissioner of said A. & C. R. R. Co.? If so, explain how and by whom it was made public. If you have any written or printed evidence of it, attach it to your deposition.

To the 4th interrogatory he saith: Yes; my appointment was made public and was published in the newspapers at Chattanooga,

Tenn., by J. C. Stanton, general superintendent of the road, and signed by him as such. I had sub-agents representing me at nearly every station along the road. I had large bills posted up at the different stations, stating that I was such land agent and offerring the lands for sale. I had advertisements in the newspapers North, East, South, and West and had agents representing me at different localities inviting attention to the lands. I had large correspondence from all sections, the outgrowth of said advertisements. I cannot give the writ-en or printed evidence asked for, for the reason that they have been filed in depositions in the chancery court at Chattanooga, Tenn., in the suit of D. J. Duffy *vs.* John Swann *et als.*, and they are not now under my control.

Int. 5. Look upon Exhibits A & B to your deposition heretofore taken and now shown you by the comm issioner and state
22 what and whose seals they are impressed on said papers. State who placed said seals on said papers and by what authority. Tell all you may know in regard to the seal from which said impressions were made. Where was it kept and under whose custody was it kept and for what purpose it was used and in what department of said Ala. & Chatta. R. R. Co.?

To the 5th interrogatory he saith: The seal impressed on said papers, to wit, the two land certificates designated as "Exhibit A" and "Exhibit B," which are attached to my deposition heretofore taken in this cause by C. P. Goree, commissioner, to wit, on the 17th day of January, 1885, and which are now shown me by the commissioner, is the seal adopted by the land department of the Ala. & Chatta. R. R. Co., and is the same seal that was used on all written instruments involving land transactions in said department. This seal was turned over to me by the former land agent, together with the land office, its papers and fixtures, and was kept in said office and under my custody. The impressions of said seal on said papers were made by me, and was placed there by me as such land agent and by direction of J. C. Stanton, general superintendent of said road.

Int. 6. Did you not bring a suit in the chancery court of Hamilton county, Tennessee, at Chattanooga, on or about 1st June, 1877, against Fred. Wolfe, John Swann, *et als.*, seeking to recover commissions for the sales of the said lands donated by Congress made by you as said land commissioner? If you said you did, state whether or not you gave your deposition in said suit in your own behalf during the month of May, 1878. In your said deposition did you not put in evidence as exhibits to your deposition two letters signed "Albert F. Thayer, sec't'y," in the words and figures following, viz:

"D. N. Stanton, pres. J. C. Stanton, sup't.
A. F. Thayer, sec't'y & treas.

23 Office of the Alabama & Chattanooga Railroad Company,
#25 Merchant exchange.

P. O. box 3694.

BOSTON, *Aug. 26th*, 1870.

Daniel Duffy, Esq., A. & C. R. R. Co., Chatta., Tenn.

DEAR SIR: Your favor of the 22d, with accompanying proposal, was duly received and submitted to Mr. J. C. Stanton, who spoke to the president concerning the matter therein, and I am requested to say that the whole matter is referred for future consideration. If you desire the same kind of maps I have already sent to you, please write me how many. Those are expensive maps and we desire to be sparing in their delivery.

Very truly, A. F. THAYER, *Sec't'y.*"

"D. N. Stanton, pres. J. C. Stanton, sup't. A. F. Thayer, sec't'y.
S. Wheeler, treas.

Office of the Alabama & Chattanooga Railroad Company, # 25 Merchant exchange.

BOSTON, *Sept. 14th*, 1870.

Daniel J. Duffy, Esq., Ala. & Chatta. R. R. Co., Chattanooga, Tenn.

DEAR SIR: We have your favor of the 5th, which has been
24 referred to the president, who says that he will attend to the matter of the maps in a short while.

Very truly, A. F. THAYER, *Sec't'y.*"

If you say you did, then, referring to the said letter dated August 26th, 1870, tell what the "proposal" referred to therein was as near as you can remember. State whether or not said proposal was in writing. If you have the said proposal or a copy thereof attach it to your answer. State in substance what said proposal contained if you say you have not the same or a copy thereof. Was not the said proposal in reference to your appointment as the land commissioner of said A. & C. R. R. Co. for the sale of said lands donated by Congress and the commissions on sales you should receive, and did you not so state in your deposition above referred to? State whether or not you corresponded with the general office of said company at Boston, Mass., after your said proposal had been submitted and after your appointment as land commissioner. And did you not file with your said deposition in the said case of D. J. Duffy *vs.* Fred. Wolfe, John Swann, *et als.*, No. 2043, in the chancery court at Chattanooga, Tenn., the said letters from Albert F. Thayer, sec't'y of said A. & C. R. R. Co., copied above? And state whether or not you received said letters in due course of mail. In your said deposition above referred to do you not show the date of your appoint-

ment as such land commissioner, the length of time you continued to act as such, and why you ceased to act and suspended further sales of said lands? You will state fully how this is.

To the 6th interrogatory he saith: Yes; I filed a suit in the chancery court against Fred. Wolfe, John Swann, *et als.*, especially against Fred. Wolfe as the assignee in bankruptcy of the Ala. & Chatta. R. R. Co., who had previously to the time of filing the said suit called upon me, as such assignee, requesting the surrender of certain
25 notes held by me to secure me in the balance of commissions due me for making sales of said lands. Upon an examination of my books and papers Mr. Wolfe, as such assignee, audited my account and found due me several thousand dollars—as I now recollect, eight thousand five hundred dollars. He executed a paper to me, as such assignee, showing my right and the justness of my claim, and to enforce the carrying out this agreement I filed my said suit. I did give my own deposition in said suit; I don't remember the date. After examination of said deposition and comparing the copies set out in the interrogatories I find that I did file as exhibits the two letters mentioned, and the copies shown me in the interrogatory are true copies. Referring to the letter of Aug. 26th, 1870, the proposal, which was in writing, was made by me to the Ala. & Chatta. R. R. Co. and was to take charge of all their lands, have them properly surveyed, and place them on the market and sell the same at a commission of ten % on the gross amount of all sales made, out of which I was to pay all of my sub-agents, and in addition to the ten % the company was to furnish me with an office, passes over its road, the necessary books, papers, and stationery to run said office. I have not a copy of said proposal. The proposal was handed to J. C. Stanton, general superintendent and a director of the said company, who read the same, handed it back to me, and requested me to mail it to him at Boston, Mass., so that he could bring it before the board of directors. He was then about to leave Chattanooga, Tenn., for Boston, Mass., to attend a directors' meeting of said Ala. & Chatta. R. R. Co. to be held in Boston, and he informed me that he desired to submit the proposal to the full board for their action, and the letter is merely an acknowledgement of the proposal having been received and presented by Mr. Stanton to the board. Yes; I corresponded with the general office of said company at Boston, Mass., after my said proposal had been
26 submitted and also after my appointment as land commissioner. I did file the letters referred to. The body of the letter as well as the signature is in the handwriting of Albert F. Thayer, secretary of said company. I received said letters in the regular course of mail. I do not recollect whether I gave the date of my appointment in the deposition referred to, nor do I now know whether I stated how long I acted as such commissioner or agent, but I now give it: I was appointed land agent or commissioner on Sept. 3d, 1870, and continued to act as such until August 12th, 1871, when I received notice from J. C. Stanton, general superintendent, which was in writing and is filed with said deposition, to suspend

sales and make a report of all sales made to Rob't Cranath, chief engineer and assistant general superintendent, which I did.

Int. 7. State anything further you may know that will go to show that the board of said Ala. & Chatta. R. R. Co. had knowledge of your action as such land commissioner. Did you not state in your said deposition in said case mentioned and was it not true then and is it not true now that your books and papers of the said land department were shown to and examined and approved by R. M. Patton, a director and also vice-president of said company, and A. C. Lippit, also a director of said company, and were you not at that time making sales of said land?

WATTS & SON AND JOHN PHELAN,
Sol's for Complainant.

To the 7th interrogatory he saith: I know nothing further that will go to show that the board of directors had knowledge that I acted as such land commissioner. They sent directors here to the city of Chattanooga to make investigations. My department was examined as well as all others by such directors. I corresponded with the general office regularly about the affairs of my department. The avails from the deferred payments arising from
27 the sales of said land were from time to time, through the local treasurer, forwarded to the general office, and it is absurd and ridiculous to say that they did not have full knowledge that I was acting as such land agent and making sales. Yes; my office was on several occasions examined both by ex-Gov. Patton, who was vice-president as well as a director of said Ala. & Chatta. R. R. Co., and also by A. C. Lippitt, also a director of said company. I was constantly making sales in my department up to the bankruptcy of the company, in June, 1871.

DAN'L J. DUFFY.

On the foregoing is endorsed: "Published by consent of parties this 9th July, 1888. Chas. A. Senn, register."

In the Chancery Court of Jefferson County, Ala., at Birmingham.

D. B. MILLER
vs.
JOHN SWANN *et als.*
} Deposition of J. C. Stanton.

Interrogatories to be propounded to J. C. Stanton, who resides in the city of N. Y., whose deposition, when taken, will be offered in evidence for the complainant on the trial of this cause.

Int. 1. Are you the same J. C. Stanton who was heretofore examined on interrogatories filed in this cause before MacGrane Coxe, Esq., as commissioner?

To interrogatory 1st he answers: I am the same J. C. Stanton who was heretofore examined on interrogatories filed in this cause before MacGrane Coxe, Esq.

Int. 2. State whether or not the president and board of directors of the Alabama & Chattanooga Railroad Company knew that the lands donated by Congress to aid in building of said railroad
28 were about to be sold during the year 1870. If you say they did, tell all you may know as to such knowledge and your means of knowing, and whether or not they knew that a land department of said company for the sale of said lands was established at Chattanooga, Tennessee, during the said year 1870. Tell all you may know in regard thereto and your means of knowing. State whether or not the said company had prepared and at what place or city and printed for said land department printed forms of deeds, title bonds or entry-takers' certificates, notes, and certificates of sale by sub-agents in well-bound books, and state whether or not said books were sent from the headquarters of said company at Boston, Mass., to said land department of Chattanooga, Tenn. If you say there were such books, tell what they contained and what you know about the same and where they came from and how they came to be in the possession of said land department, and, if you know, state where such books are now. Please examine two letters now shown you by the commissioner, one dated Aug. 26th, 1870, and the other Sept. 14th, 1870, and both signed Albert F. Thayer, and make the same exhibits to your answer, and state if you know the said Thayer and what position he held at the date of said letters, and state whether or not you are familiar with his handwriting, and, if so, how did you become so, and whether or not the signature and body of said letters are in his handwriting. State whether or not, at the date of said letter dated August 26th, 1870, you were in the city of Boston, Mass., attending a meeting of the board of directors of said Ala. & Chatta. R. R. Co. If so, in what capacity? State whether or not you were a director of said company at that time or about that time. Refreshing your memory by the aid of the said letters, tell, if you remember, any such meeting, and, if so, tell what it was called for and at whose suggestion. If you say at your suggestion, tell whether or not you had said meeting called, among other things, for the
29 purpose of having said lands sold and the discussion of that question and how it should be done. Tell all you may know about this as fully and particularly as you can. Referring again to said letter of date Aug. 26th, 1870, and refreshing your memory, state whether or not you and the said Daniel J. Duffy had not talked over the proposal therein mentioned before you went on to attend said meeting of the said directors. Tell fully and particularly all you may remember about this. The said letter states that the said proposal of said Duffy "was submitted to J. C. Stanton, who spoke to the president concerning the matter therein." State whether or not such is true. Please tell whether or not the said proposal was in writing and if you have the same or copy attach the same to your answer if you say it was in writing. If you have not the same or copy, then tell the wording or substance of the same as nearly as you can. The said letter also says, "and I am requested to say that the whole matter is referred for future consideration." Now, please state whether or not the said proposal of said Duffy was called up

for action in said meeting of the directors of said R. R. Co. or at any other and which meeting and when and where. If so, tell what was done in regard thereto as fully and particularly as you can. State whether or not the matter of said proposal was discussed by said board and state what was said in regard to it. If anything was said in regard to what commissions should be allowed for sales of said lands, state what it was and all about it, and if anything was determined upon as to what commissions should be allowed tell what it was. Please tell whether or not at said meeting or at any meeting of the directors of said railroad company and when and where anything was said or done or vote passed or resolution adopted in regard to the appointment of said Daniel J. Duffy as the land commissioner of said R. R. Co. to sell said lands donated by Congress, and state whether or not such action, vote, or resolution, if any, was
30 in writing. State whether or not anything was said or done or action taken or vote or resolution passed in regard to authorizing said Daniel J. Duffy to make said sales and execute deeds to said lands. Tell what, if you say any such, action was taken or votes or resolutions were adopted in regard to the appointment of said Duffy as such land commissioner or as to giving him authority to sell the said lands or as to accepting his said proposal. Tell whether the same were in writing or not; and, if so, whether or not they were recorded in the minute book of said A. & C. R. R. Co. If you say they were recorded or were in writing, then if you have a copy attach it to your answer, and if you have no copy tell, as minutely and particularly as you can, the wording thereof or the substance. State whether or not anything was said or done or vote or resolution adopted or action taken in regard to the appointment of a superintendent and general manager of said railroad company; if so, state whether it was in writing or not and whether or not it was recorded in the minute book of said company, and tell as nearly as you can the wording or substance thereof. If you say that said J. C. Stanton was appointed such superintendent and manager of said railroad company, state whether or not the secretary of said company furnished you with a copy of the proceedings of your appointment; if so, attach the same or copy to your answer; if you say you have it not, then tell as nearly and minutely as you can the wording or substance thereof.

To interrogatory 2nd he answers: The president and board of directors of the Ala. & Chatta. R. R. Co. did know that the lands donated by Congress to aid in the building of said railroad were about to be sold. I was a director and the general superintendent. They did know that a land department of said company for the sale of said lands was established at Chattanooga, Tenn., during the said year 1870.

31 The president and board of directors directed me to find some competent man to take charge of the lands donated by Congress to this company and sell the same. I first employed for the company Dr. B. P. Belknap. He did not prove satisfactory to the company, although his appointment was approved by the president and board of directors when made. The board requested me

to notify him that his services would not be required any longer. I did so, and he ceased to so act some time in September, 1870. I had had some talk with D. J. Duffy in regard to the sales of the Alabama & Chattanooga railroad lands. He seemed to understand it better than any other man with whom I had talked in regard to the lands, and had conversation with quite a number before recommending him to the board of directors. We talked about the terms, but there was no positive understanding, but I got Mr. Duffy to either address a letter to me or to the president and board of directors, I don't now remember which, and send same to Boston, that being the main office of the company. The letter was received and read by the secretary, Albert F. Thayer, to the board of directors, then in session. I was a director and present at the meeting. They authorized me by vote in that meeting to employ Mr. Duffy as land agent, which I did as such land agent, and he had full charge of that department. The company had prepared and printed for the land department forms of deeds, title bonds, or entry-takers' certificates, but as to whether they were sent from Boston or were printed elsewhere I do not recollect. I don't know where such books and blanks now are. They are not in my possession, and the last I saw — them was at the Alabama & Chattanooga Railroad Company's office at Chattanooga, Tenn. I have examined the two letters shown me by the commissioner, and they are in the handwriting of Mr. Albert F. Thayer, and I attach same and make them Exhibits A & B. I was in Boston about that time, where I met with the board of directors. I was
32 a director at that time. The meeting was called to transact any business that might come before them. There were monthly reports sent from Chattanooga to the president and board of directors at Boston of what had been done in every department of the company in the South, such as pay-rolls, rights of way, ties, iron, or any material that was bought by the company, and reports were also made by the land department of all sales, whether for cash, notes, or otherwise, and I was expected to explain to the board of directors at their meetings whenever I was present. They fully approved of the sales of lands as well as other matters, and there was nothing done in my department or any other of which they did not fully approve. At a meeting, I think, held some time in August, 1870, the land question was brought up and discussed and Duffy's proposition, as I have stated, read, and the company accepted the terms and approved his appointment. Myself and the said Daniel J. Duffy had talked over the said proposal before the meeting. Duffy's proposition was in writing, and I think directed to the president and board of directors. I have not got said proposal or any copy and do not know where it can be found. The proposal spoke for itself, and I do not remember its contents; only know it was accepted. I was authorized to sign all deeds, Duffy making the sales. D. J. Duffy had authority to sell the lands of the Ala. & Chatta. R. R. Co., but the authority to sign the deeds upon the full payment of purchase-money devolved on me. The directors, in regular meeting, by vote authorized me to appoint Mr.

Duffy, and this vote ought to have been recorded on the minutes of said meeting, and I suppose it was. I haven't got the minute book. It is not in my possession or control, nor have I access to it. My recollection is that my appointment as superintendent and general manager had been made long before that meeting. I was appointed
33 at a meeting of the board of directors and it was recorded on the minutes. I cannot remember the wording of the authority given me by the board, but it was a full authority for me to do everything that was necessary to build the road in the South, to sell lands donated, and I remember the question of selling the lands was fully discussed in the meetings. I was fully authorized, by a vote of the board, to sell the lands belonging to the company, and this authority should have been on the minutes, and know nothing to the contrary but that it was; but as the book is not in my possession I am unable to give a copy.

Int. 3. If you have said you were appointed the superintendent and manager of the said Ala. & Chatta. R. R. Co., please state whether or not you were familiar with *what* part of the line of said A. & C. R. R. constituted the old Wills Valley R. R. and *what* part the old Northeast & Southwest Ala. R. R. If so, please tell the termini of said railroads. When you took charge of said A. & C. R. R. as the superintendent and manager please tell whether or not any of the lands donated by Congress to aid in the building of said road that lie on or near that part of the line of said road which constituted the said Northeast & Southwest Ala. R. R. had been sold. If so, on what part of said line and to whom? Please state whether or not any sales of said lands were made on said part of said line after you were so appointed. If so, on what part and to whom? If you say such sales were made, then tell on what part of the said line the first sales were made and to whom and when, and can tell, if you can, the exact part or point on the said line at or near which the said first sales were made, and please explain, if you can, why it was the said first sales were made there. Please tell to what point the said Ala. & Chatta. R. R. had been completed on the 13th Sept., 1870, the date of the alleged sales to Joab Bagley of the lands in dispute *of* this suit. Please tell when the Ala. & Chatta. R. R. was finished.

To interrogatory 3rd he answers: I was familiar with those two
34 railroads. The terminus of the Wills Valley Railroad Co. was at Wauhatchie, Tennessee, and at a point opposite Gadsden. The terminus of the N. E. & S. W. Railroad Company was from the latter point to Meridian, Mississippi. To my knowledge, there had been no sale of the lands donated by Congress to aid in the building of the N. E. & S. W. Ala. R. R. Co. when I took charge as general manager of the A. & C. R. R. Co. There were sales made of said lands after I was appointed as general manager. Sales were made on different parts of the lines from Tuscaloosa up to Attalla. As I now remember, the first sales were made at or near Elyton, Alabama. At that time there was a good deal of talk as between the officers of the South & North Alabama Railroad Company and the officers of the Ala. & Chatta. R. R. Co. in regard to the ownership of the lands near Elyton. I consulted with Key & Eakin, the

attorneys of the company, in regard to it. They advised me that the company had a perfect title to those lands, as it was first selected by the company, and that the company had the right to sell the same. So I, as general manager, selected those lands lying near Elyton and ordered them sold. My recollection is that, on the 13th day of September, 1870, the Ala. & Chattanooga R. R. was completed to a point near Red Gap, about three miles and a half northeast of Birmingham, Alabama. The Alabama & Chattanooga railroad was completed and finished on the 15th day of May, 1871, and on the 16th day of May, 1871, trains run from Chattanooga to Meridian, the whole length of the line.

J. C. STANTON.

WM. B. McNIECE,
Commissioner.

35 EXHIBIT "A" # 2.

D. N. Stanton, pres. J. C. Stanton, sup't. A. F. Thayer, sec't'y.

Alabama & Chattanooga Railroad Company, # 25 Merchant exchange.

P. O. box 3694.

BOSTON, *Aug. 26th*, 1870.

Daniel J. Duffy, Esq., A. & C. R. R. Co., Chattanooga, Tenn.

DEAR SIR: Your favor of the 22d, with accompanying proposal, was duly received and submitted to Mr. J. C. Stanton, who spoke to the president concerning the matter therein, and I am requested to say that the whole matter is referred for future consideration. If you desire the same kind of maps I have already sent to you please write me how many. Those are expensive maps and we desire to be sparing in their delivery.

Very truly, A. F. THAYER, *Sec't'y.*

[Written across the face:] Identified by writing my name across this day, May 8th, 1888. Albert F. Thayer.

EXHIBIT "B" # 3.

D. N. Stanton, pres. J. C. Stanton, sup't. A. F. Thayer, sec't'y.
S. Wheeler, treas.

Alabama & Chattanooga Railroad Company, # 25 Merchants' exchange.

BOSTON, *Sept. 14th*, 1870.

Daniel J. Duffy, Esq., Ala. & Chatta. R. R. Co., Chattanooga, Tenn.

DEAR SIR: We have your favor of the 5th, which has been referred to the president, who says that he will attend to the matter of the maps in a short time.

Very truly, ALBERT F. THAYER, *Sec't'y.*

[Written across the face:] Identified by writing my name across this day, May 8th, 1888. Albert F. Thayer.

On the foregoing is endorsed: "Published by consent of parties this July 9th, 1888. Chas. A. Senn, register."

36 In the Chancery Court of Jefferson County, Ala., at Birmingham.

D. B. MILLER
vs.
JOHN SWANN, JOHN A. BILLUPS, *et als.* } Deposition of Albert F. Thayer.

Interrogatories to be prop-unded to Albert F. Thayer, who resides at Maple Hill, Kansas, whose deposition when taken will be offered in evidence for the complainant on the trial of said cause.

Int. 1. State your age and occupation and in what occupation you were in the years 1868, 1869, 1870.

To the 1st interrogatory he saith: My age is 47 years; my occupation that of a farmer. In 1868, '69, and 1870 I was the secretary of the Ala. & Chatta. R. R. Co. and of the roads of which it was the successor, to the best of my recollection.

Int. 2. If you answer you were the secretary of the Wills Valley R. R. Co. and also of the Ala. & Chatta. R. R. Co., please examine the paper-writing now shown you by the commissioner and say if you recognize from said paper-writing a proceeding of the meeting of the board of directors and stockholders held at Montgomery, Alabama, as the said paper purports to be; and was the same duly recorded in the minute books of said companies? Attach a copy of said paper to your deposition and mark the same Exhibit 1.

To the 2nd interrogatory he saith: I recognize the paper referred to and remember it as the proceedings of the meeting said to have been held at Montgomery, Ala., by the stockholders of the Wills Valley R. R. Co., and to the best of my recollection it was spread upon the record book of said company, afterwards the Ala. & Chatta. R. R. Co., and a copy of the same is hereto annexed, marked Exhibit 1.

37 Int. 3. Please state if you are acquainted with Daniel J. Duffy, of Chattanooga, Tenn.; if so, please state if you know and your means of knowing what position, if any, the said Duffy held in the Ala. & Chatt. R. R. Co. during the year 1870. If you have said that during the year 1870 you were the secretary or secretary and treasurer of the said Ala. & Chatta. R. R. Co., please state if you, as such secretary or secretary and treasurer, corresponded with the said Daniel J. Duffy about and concerning the land department of said R. R. Co. Please state, if you know, whether or not the president and board of directors of said Ala. & Chatta. R. R. Co. knew that the lands donated by Congress to aid in the building of the said R. R. were about to be sold in the year 1870, and whether or not did they establish a land department for the

sale of said lands. State whether or not any vote or resolution was passed or other action taken and what towards establishing said land department, and whether or not the same was put upon the minute book of said company. Tell all you may know about this and give, as near as you can, the words of said vote, resolution, or other action or the substance thereof, and if you have any copy thereof attach it to your answer. Please state whether or not the president and board of directors of said company did direct and authorize you to have prepared and printed at Boston, Mass., for the use of said land department at Chattanooga, Tenn., from copies furnished by said Daniel J. Duffy, well-bound books containing printed forms of deeds, title bonds, entry-takers' certificates, notes, and certificates of sales by sub-agents, and were they not printed and bound and paid for at the general office of said company at Boston, Mass., and were they not then boxed and shipped by express, addressed to the land department of the A. & C. R. R. Co. at Chattanooga, Tenn., in care of H. E. Waite, local treasurer?

To the 3rd interrogatory he saith: I am acquainted with Daniel J. Duffy, of Chattanooga, Tenn.; he was the land commissioner of the Ala. & Chatta. R. R. Co. in 1870. I, as secretary of said
38 company, corresponded with said Duffy concerning matters connected with the land department of said railroad. I believe the president and board of directors knew that the lands of said R. R. Co. were about to be sold. The land department and the office of land commissioner were established by Mr. J. C. Stanton, sup't and general manager of said R. R. Co., he having full power to create the same. I do not remember of any vote of the board of directors especially creating the land department or the office of land commissioner. I have the impression that all the books and other papers referred to for the land department were printed and bound in Boston, but I do not feel positive enough to state it as a fact; the imprint of the maker and binder would show it, and if, as I think, it was in Boston they were shipped to H. E. Waite, local treasurer, to whom all matter- of that nature were directed.

Int. 4. Please examine a letter now shown you by the commissioner, dated Aug. 26th, 1870, from Boston, Mass., and signed Albert F. Thayer, sec't'y, and tell in whose handwriting it is; and if you say the body and signature are in your handwriting, then tell whether or not you were then the secretary of said Ala. & Chatta. R. R. Co. and whether you wrote said letter as such secretary. Please state whether or not it was your duty as such secretary to keep and did you not keep in a book kept for that purpose a correct minute of all the proceedings of the board of directors of said A. & C. R. R. Co., and were you not present at all of said meetings of said board of directors while you were such secretary, and did you not record their proceedings.

Now, please examine said letter and make a copy an exhibit, marked # 2, to your said answer and have the commissioner to write his name thereon, 1, so as to identify it, as the original will be needed to show another witness, and tell whether or not the proposal therein referred to was duly received by due course

of mail. State whether or not the said proposal was in writing; and, if so, what has become of it? If you have it or a copy attach it to your answer, and if you have not the same or a copy tell as minutely and particularly as you can the wording or substance thereof. State what you did with said proposal after you received it. If you say you submitted it to any one tell who it was. If you say you submitted it to J. C. Stanton tell what he did with it. If you say he submitted it to the president of the company tell whether or not the said president gave you any and what instructions in regard to it, and tell whether or not you informed said Daniel J. Duffy thereof and by said letter. You say in said letter that the said proposal was "submitted to J. C. Stanton, who spoke to the president concerning the matter therein, and I (you) am requested to say that the whole matter is referred for further consideration." Now, please state whether or not it is true that said J. C. Stanton was then present in Boston, Mass., to attend a meeting of the board of directors of said A. & C. R. R. Co., having come on from Chattanooga, Tenn., to attend said meeting as a director thereof. If so, please state whether or not during said meeting or any day of said meeting or any meeting of said board the said proposal of said Duffy was called up for action thereon, and tell whether or not the matter of said proposal was discussed by the said meeting or meetings. Tell whether or not the said board of directors talked about and discussed as to what commissions or compensation should be allowed said Duffy on sales of said lands so donated by Congress, and if you say they did, then tell whether or not they determined upon anything in regard thereto and tell what it was. State whether or not anything was said or done at said meeting or at any directors' meeting or vote passed or resolution adopted in regard to the appointment of said D. J. Duffy as the land commissioner of said company to sell said lands so donated by Congress, and state whether or not such action, vote, or resolution, if any, was in writing. State whether or not at said meeting or any meeting of the directors of said Co. anything was said or done or action taken or vote or resolution passed in regard to authorizing said Duffy to make said sales and execute deeds therefor. Tell what. If you say any such action was taken or votes or resolutions were adopted in regard to the appointment of him, said Duffy, as said land commissioner or as to giving him authority to sell said lands or as to accepting his said proposal, tell whether same were in writing or not; whether or not they were recorded in the minute book of said company. If you say they were or were in writing, then, if you have copy or copies thereof, attach them to your answer; and if you have them not, then give as minutely and particularly as you can the wording thereof or their substance. State whether or not anything was said or done or vote passed or resolution adopted at said meeting of the said directors in regard to said J. C. Stanton's signing said deeds to said lands or in regard to authorizing said Stanton to execute said deeds to said lands. If so, tell what, and whether or not the same was in writing. If in writing, were they recorded in the minute book of said company? Tell as nearly as you can the

wording or substance of said vote, resolution, or action taken, and if you have copy or copies, if you say they were recorded or in writing, attach same to your answer. State whether or not at said meeting or at any meeting of the said directors any vote was passed or resolution adopted or action taken in regard to the appointment of a superintendent and general manager of said railroad Co. If so, what, and who was appointed? If any such action was taken or vote or resolution adopted, state whether it was in writing or not; and, if so, whether recorded or not; and, if
41 recorded or in writing, tell the wording thereof or substance as near as you can. State whether or not it is true that J. C. Stanton was appointed the general superintendent and manager of said Alabama & Chattanooga R. R. Co. at said meeting or any meeting of the said directors of said Co. and the proceedings duly recorded in the minute book, and did you not make a copy of the proceedings showing his appointment and authority and give it to him, signed by D. N. Stanton as president and Albert F. Thayer as sec't'y of said R. R. Co., with the common seal of the company attached thereto? If you say you did, give the substance and wording as near as you can of such paper so furnished him. If you have access to said minute book or have copies thereof please look at the meetings of the board of directors of said company between the date of August 27th, 1870, and Sept. 1st, 1870, and state if you do not find recorded therein the proceedings of the appointment of said J. C. Stanton as the gen'l sup't & manager of said R. R. Co. and the acceptance of the proposal of D. J. Duffy above referred to. If you have such minute book or a copy thereof of proceedings between said dates make an examined copy and attach same to your answer. If the said book is not accessible to you and you have no copy and you cannot refresh your memory thereby, then please examine said letter dated Aug. 26th, 1870, a copy of which is made an exhibit to your answer, and the letter now shown you by the commissioner, dated Sept. 14th, 1870, and signed "Albert F. Thayer, sec't'y," and tell in whose handwriting the said letter dated Sept. 14th, 1870, is; and if you say in yours, then tell if you are the same Albert F. Thayer who was the secretary of the said R. R. Co. at that time and if the said letter was an official letter, and make a copy of said letter an Exhibit #3 to your answer, and let the commissioner write his name on it so as to identify it, as the original will be needed to show to another witness. Please state if these letters do not refresh your memory as to the transactions hereinbefore asked about
42 in this interrogatory, and state whether or not said Duffy was at the date of said letter of Sept. 14th, 1870, and before that acting as the land commissioner or agent for said R. R. Co. with the knowledge of the president and directors of said R. R. Co., and state from your best recollection, as refreshed from said letters or otherwise, as to what said minute book showed as to the said appointment of said J. C. Stanton as the general superintendent and manager and as to authorizing him to sell said lands and the acceptance of the said Duffy's said proposal and his authority to sell said lands.

If you cannot remember the exact wording of said minutes give as near as you can your remembrance of the substance thereof.

To the 4th interrogatory he saith: I have examined the letter of August 26th, 1870. It is in my handwriting and was written by me while I was the secretary of said company. It was my duty as secretary to record the proceedings of the board of directors, and I did so record them. I have examined said letter of Aug. 26th, 1870, a copy of which is hereto annexed, marked Exhibit # 2. The proposal therein referred to was without doubt duly received by mail. I do not know what became of it. I have no copy of it. I do not know the substance of it. I believe I referred or submitted it to Mr. J. C. Stanton, sup't and general manager. I do not know what he did with it. In the letter I state Mr. J. C. Stanton spoke to the president concerning the matter therein. I do not say he submitted it to the president, for, as I remember it from the letter, Mr. J. C. Stanton merely consulted with the president concerning the proposal, and the whole matter was referred for future consideration (or consultation). The president gave me no instructions in the matter. I believe Mr. J. C. Stanton was at that time in Boston; whether to attend a directors' meeting or not I do not know. I do not remember that the proposal was ever referred to the board of directors for official action or was ever discussed by them
43 in a meeting of the board. I do not remember that the board of directors ever took any action concerning Mr. Duffy. I do not remember that the board of the directors ever specially authorized Mr. J. C. Stanton to sign deeds. The power given him was general and not specific, and the board doubtless did not consider it necessary to specify what he should and should not do. The authority given J. C. Stanton as superintendent and general manager was sweeping and extraordinary, as I remember it, authorizing him to do anything and everything necessary for the speedy completion of the road. He needed no further powers, for the board had given him all the power they had to give. The board, by written vote (for all votes passed were first written while I was secretary), appointed J. C. Stanton to be superintendent and general manager, with the powers above stated, which carried everything, and this vote was recorded by me in the minute book. I do not remember whether he was furnished with a copy of the vote under seal, but doubtless he was. I do not remember the wording of the vote or anything about it, except the vivid impression that it was sweeping and extraordinary in its provisions. I have examined the letter of Sept. 14th, 1870, a copy of which is hereto annexed, marked Exhibit # 3. The letter is in my handwriting, and I am the Albert Thayer, sec't'y, who signed the same. The letter is an official letter. I think Mr. Duffy was at that time acting as land commissioner of the company, and with the knowledge, as I believe, of the president and directors of the company. I have heretofore stated concerning the appointment of Mr. J. C. Stanton as superintendent and general manager and of the extraordinary powers given him. This I now repeat as my answer to this clause in the interrogatory.

44 Int. 5. State any other thing you may know tending to

show the knowledge of the board of directors of said Ala. & Chatta. R. R. Co. of the establishment of said land department at Chattanooga, Tenn., and sales made by said department as if specially interrogated thereto.

WATTS & SON AND JOHN PHELAN,
Sol's for Complainants.

To the 5th interrogatory he saith: At the time referred to, say August, 1870, to January, 1871, the company was in trouble financially on account of the Franco-Prussian war, which effectually stopped the sale of the bonds of the company in Paris, where they were being placed. Great effort was being made to complete the road and all means were to be used to accomplish that end; among them was the sale of the lands. Mr. J. C. Stanton, the sup't and general manager, a man of wonderful energy and determination, got tired and annoyed by interference from Boston and elsewhere and came to Boston and told the board of directors in substance "that if he was to rush the work and complete the road he must have absolute and complete power without being subject to the control of or accountable to the board of directors or any one else, and if the board would not give him this power they might put some one else in charge. The necessities of the case demanded that the power be given and it was given, and under it Mr. Stanton appointed Mr. Duffy the land commissioner with the full knowledge of the president and directors, as I believe, and Mr. Duffy sold the lands and the company used the money to help complete the road. There is no doubt in my mind but that the power given Mr. Stanton covered and was intended to cover the sale of the lands and everything else necessary to do and to speedily complete the road.

ALBERT F. THAYER.

Topeka, Kansas, May 9th, 1888.

45 EXHIBIT 1.

At a meeting of the stockholders of the Wills Valley R. R. Co. held at the Exchange hotel, in the city of Montgomery, on this the 16th day of December, 1868, at 10 o'clock a. m., the following stockholders were present: Rob't M. Patton, president; John C. Stanton, and S. A. Carleton.

On motion, Abram G. Walker was appointe l secretary *pro tempore.*

It was then shown that notice of this meeting had been given by the secretary of said R. R. Co. by previous publication for more than five days in newspapers published respectively in Boston, Mass.; Chattanooga, Tenn.; Macon, Ga, and Montgomery, Ala., which notice stated the purpose — which the meeting was called as follows, to wit:

Wills Valley Railroad Company.

A special meeting of the stockholders of the Wills Valley R. R. Co. will be held at 10 o'clock a. m., on Wednesday, the 16th day of December, 1868, at the Exchange hotel, in Montgomery, in the State of Alabama, for the purpose of accepting the act of the General Assembly of Ala. approved November 17th, 1868, and entitled "An act relating to the Wills Valley R. R. Co. and the Northeast & Southwest Ala. R. R. Co.," and authorizing the purchase of the franchise and railroads of said Northeast & Southwest Ala. R. R. Co. and all other property mentioned in said act, and all other actions proper to carry into effect all the provisions of said act, including the changing the name of the corporation, and to mortgage the franchise and any and all property which the corporation may now or hereafter possess; also for the purpose of removing all the present officers of said company, filling all such vacancies, changing the by-laws, and transacting any other business which may come before the meeting.

Per order of directors.

ALBERT F. THAYER, *Sec'y.*

Boston, Mass., Nov. 29th, 1868.

The number of shares of stock of the said R. R. Co. was
46 represented by following stockholders:

John C. Stanton, for himself	200	shares.
" for Lewy Sutton	44	"
" for J. R. Wilkinson	41	"
" for B. F. Pace	6	"
" for J. N. Nisbit	22	"
" for Empire State Coal & Iron Co.	56	"
" for Geo. H. Haxlehurst	24	"
" for G. R. Gross	50	"
" for W. J. Haralson	20	"
" for W. Crutchfield	120	"
" for A. M. Johnston	80	"
S. A. Carleton, for himself	295	"
" for D. L. Stanton	200	"
Isaac T. Burr	200	"
Making a total of stock represented	1,358	"

The minutes of the last meeting were read and approved. A majority of the stock being represented, the meeting proceeded to business, when, on motion of S. A. Carleton, the following resolutions were unanimously adopted:

Resolved, That the act of the General Assembly of the State of Alabama entitled An act relating to the Wills Valley R. R. Co. and the Northeast & Southwest Ala. R. R. Co., approved Nov. 17th, 1868, be, and the same is hereby, accepted by this company.

Resolved, That a committee consisting of J. C. Stanton, Isaac T. Burr, and D. N. Stanton or either of them are hereby empowered to buy the Northeast & Southwest Ala. R. R. Co., to be sold under the mortgage to the State of Alabama 16th of December, 1868, for and on account of the Wills Valley R. R. Co., and that S. A.
47 Carleton be added to said committee with the same power and authority of purchase invested in the other members of said committee.

The meeting adjourned until to-morrow morning at 9 o'clock.

EXCHANGE HOTEL, MONTGOMERY,
THURSDAY MORNING, 9 O'CLOCK, *Dec. 17th*, 1868.

The meeting met according to adjourment.

Present: Rob't M. Patton, pres.; D. N. Stanton, Isaac T. Burr, J. C. Stanton, and S. A. Carleton, stockholders.

J. C. Stanton offered the following resolution, which was unanimously adopted:

Resolved, That the offices of the directors, other officers, with the exception of the treasurer, of the Wills Valley R. R. Co., be, and the same are hereby, vacated with a view to a change of its name and a reorganization.

On motion of L. A. Carlington, the following resolution was unanimously adopted:

Resolved, That the words "consist of not less than nine" *to* be stricken out of article 4th of by-laws, so as to leave the number of directors indefinite.

On motion of J. C. Stanton, the following resolution was unanimously adopted:

Resolved, That this convention of stockholders now proceed to elect by ballot twelve directors, one of whom shall be designated on the ballot as president, and the director so designated shall be the president.

Whereupon an election was then held, which resulted in the unanimous election of the following stockholders as president and directors, to wit:

Daniel N. Stanton, of Mass., as president and director; Rob't M. Patton, of Alabama, director; John C. Stanton, of Mass., director; Isaac T. Burr, director; Lewis Rice, of Mass., director; Francis Dane, of Mass., director; John M. Courtney, of Mass., director; John Demeritt, Mass., director; Robert Jemison, Jr., of Alabama, director; William P. Rathbone, of Tenn., director; Wm. Claflin, of Mass., director; Sam'l A. Carleton, Mass., director; which election was then announced by the president.

48 John C. Stanton offered the following resolution:

Resolved, That the president accept and declare the name of this corporation changed to the Alabama & Chattanooga Railroad Company, and so announce in some newspaper published in the State of Alabama.

Which resolution was, on motion, unanimously adopted; and the president declared the name adopted, in pursuance of the foregoing resolution.

On motion of Daniel N. Stanton, the following resolution was unanimously adopted:

Resolved, That the contract between the Northeast & Southwest R. R. Co. entered into in the city of Montgomery and executed by their respective presidents, Robert Jemison, Jr., and Robert M. Patton, be, and the same is hereby, approved, ratified, and adopted, and as permanent evidence thereof the same is hereby copied, as follows, to wit:

The articles of agreement following, made and entered into by and between the Northeast & Southwest Ala. R. R. Co. and the Wills Valley R. R. Co. on this the 18th day of November, A. D. 1868, witnesseth as follows, to wit:

1st. The executory contract for the consolidation of the said two R. R. companies, made on the 3rd of October, 1868, is rescinded.

2nd. The Northeast & Southwest R. R. Co. relinquishes and conveys unto the Wills Valley R. R. Co. all right and claim, either at law or in equity, in or to its road and road-bed, superstructure of the road, bridges, iron, its franchise and privileges in the State- of Alabama and Mississippi or any other State, and all equities of redemption and rights of redemption under any statute, and all its property, real, personal, and mixed, in Mississippi and Alabama, with the exception and reservation of unpaid subscriptions of stock, contracts for construction, labor, or material, the office furniture at Tuscaloosa, all lands taken as subscription of stock or in payment of such subscriptions or in payment of debts, and all bonds and notes and other debts due said N. E. & S. W. R. R. Co.

3rd. The N. E. & S. W. R. R. Co. agree to procure and furnish to said Wills Valley Railroad Co. individual indemnity against its creditors.

4th. The N. E. & S. W. R. R. Co. agrees to make adequate arrangements to procure, as — practicable and with convenient dispatch, and extinction of all the debts of the N. E. & S. W. Ala. R. R. Co. and a relinquishment of all its stock to J. C. Stanton, Isaac T. Burr, and their associates.

49

5th. The N. E. & S. W. Ala. R. R. Co. agrees that the said Wills Valley R. R. Co. may purchase the franchise, road, property, real, personal, and mixed, and all the privilegge and rights of every description of the N. E. & S. W. R. R. Co. which may be sold under any mortgage or judgment or other incumbrances against —, and releases claims to any excess above the amount of such judgment, mortgage, or other incumbrance.

6th. The Wills Valley R. R. Co. agree to purchase at the sale under the mortgage given by the N. E. & S. W. R. R. Co. to secure the State out of three per cent. fund and to discharge the entire debt of the State of Alabama secured by such mortgage irrespective of amount bid or agreed to be paid for such purpose.

7th. The said Wills Valley agree to pay an amount of the unendorsed bonds of said Wills Valley R. R. Co. or of the Ala. & Chatta. R. R. Co. after that name is adopted, to be ascertained by subtracting from seven hundred and fifty thousand dollars the amount of

the principal and interest of the said debt to the State of Alabama at the time of purchase under said mortgage, and also the amount of debts of Thomas Scott, John C. Adams, Wm. A. C. Jones, and Chas. E. Rushing, which said bonds shall be secured by a second mortgage on the entire road and its road-bed, iron and fixtures, machine shops, and engine-houses from Chattanooga to Meridian, and said bonds shall be paid over to the order of the N. E. & S. W. Ala. R. R. Co.

8th. There are pending in the U. S. district court at Montgomery, Ala, two suits to which the N. E. & S. W. Ala. R. R. Co. is a defendant, one in favor of Davis & Jourdan, as trustees, and one, the other, in favor of the Ala. & Fla. R. R. Co., of Florida, in which
50 suit large interests are claimed. These suits are controverted and are believed to be unjust. It is agreed that if these suits are not defeated or in some way settled before time for paying over the bonds under the next preceding section of this agreement, then eighty-five thousand dollars (or as much as may remain after paying the State debt and that of Scott, Jones, Rushing & Co.) shall be retained out of said bonds until said suits shall be decided or settled, and after the same shall be decided or settled the said Wills Valley R. R. Co. or Ala. & Chatta. R. R. Co. shall permanently retain out of the sum retained under this section whatever may have to be made under such settlement or decision and the next preceding section in this particular.

9th. The bonds in which said Ala. & Chatta. R. R. Co., after the said Wills Valley R. R. Co. shall take that name, — pay off debts as heretofore mentioned shall bear date the first Monday in January, 1869, and shall not bear interest until the first Monday in 1871. The foregoing agreement is executed by said Wills Valley R. R. Co., by R. M. Patton as president, and by the N. E. & S. W. Ala. R. R. Co., by R. Jemison, Jr., its president, and may be ratified and confirmed by the board of directors of the said two companies, executed in duplicate, the day and date above written, and this agreement shall not be binding until so ratified.

WILLS VALLEY R. R. CO.,
By R. M. PATTON, *President.*
N. E. & S. W. R. R. CO.,
By R. JEMISON, JR., *President.*

A. J. WALKER.
W. A. C. JONES.

On comparing this with the original the word "January" is omitted in the 9th article before the word "in" and figures "1871."

R. JEMISON, JR., *President.*
A. J. WALKER.

51 On motion of D. N. Stanton, the following was offered and unanimously adopted:

Resolved, That the personal guaranty of R. Jemison, Jr., and W. A. C. Jones, taken by A. J. Walker at Eutaw on the third day of

Dec., 1868, be, and the same is hereby, accepted; which agreement of indemnity is in words and figures following, to wit:

This agreement made and entered into at Eutaw in the county of Greene in the State of Alabama by and between R. Jemison, Jr., and W. A. C. Jones, the parties of the first part and the Wills Valley R. R. Co., the party of the second part, witnesseth as follows to wit:

Whereas, the N. E. & S. W. Ala. R. R. Co., on the 18th day of November, 1868, made an agreement with the Willis Valley R. R. Co. which was executed by the respective presidents of said railroad companies, for such railroad companies, and whereas said agreement was on the 3d day of December, 1869, ratified by the president and directors of the N. E. & S. W. R. R. Co. and whereas, by the terms of said agreement, the said N. E. & S. W. R. R. Co. agreed to procure and furnish to the said Wills Valley R. R. Co. individual indemnity against the creditors of the said N. E. & S. W. R. R. Co. and its relinquishment of its stock to J. C. Stanton and I. T. Burr and their associates; and whereas, the N. E. & S. W. Ala. R. R. Co. has made a contract with the said R. Jemison, Jr., and W. A. C. Jones to indemnify the said Wills Valley R. R. Co. against its creditors and use due diligence to procure a relinquishment of its stock as aforesaid.

Now, we, R. Jemison and W. A. C. Jones, the parties of the first part, do covenant and agree — the Wills Valley R. R. Co. by that name, and, also, by the name of the Ala. & Chatta. R. R. Co., if it should hereafter take the latter name, to indemnify and save harmless against all creditors of the said N. E. & S. W. Ala. R. R. Co. and
to use due diligence to obtain relinquishments to J. C. Stanton
52 and I. T. Burr and their associates, of the stock of the said N. E. & S. W. Ala. R. R. Co.

Given under our hands and seals, this 3rd day of Dec., 1868, in presence of R. Jemison, Jr., A. C. Burton, W. A. C. Jones, James G. Uping, as the attorney of the Wills Valley R. R. Co.

I accept the above agreement as satisfactory compliance with the provisions of article 3 and 4 of agreement between N. E. & S. W. Ala. R. R. Co. and the Wills Valley R. R. Co., made and entered into on the 18th day of November, 1868.

A. J. WALKER.

Attest:
A. C. BURTON.
JAMES G. UPING.

On motion of D. N. Stanton, the following resolution was offerred and unanimously adopted:

Resolved, That the by-laws be so amended as to allow the board of directors power to modify, amend, or change the same at any time, notice thereof having been given at a previous meeting.

The convention then adjourned until to-morrow morning at 9 o'clock.

EXCHANGE HOTEL, MONTGOMERY,
FRIDAY MORNING, 9 O'CLOCK, *Dec.* 18*th*, 1868.

The convention met pursuant to adjournment.

Present: D. N. Stanton, I. T. Burr, J. C. Stanton, S. A. Carleton, R. M. Patton, and R. Jemison, Jr.

S. A. Carleton offered the following preamble and resolution, which, on motion, was unanimously adopted:

Whereas D. N. Stanton, the president of this R. R. Co., has announced in the Montgomery Advertiser, a newspaper published in the city of Montgomery, that the name of this corporation is changed from the Wills Valley R. R. Co. to Ala. & Chatta. R. R. Co.; and

Whereas the Wills Valley R. R. Co. has acquired the franchise and property of the N. E. & S. W. R. R. Co.:

Therefore be it resolved, That the name of the corporation be, and the same is hereby, changed from the Wills Valley R. R. Co. to the Ala. & Chatta. R. R. Co. and by the latter name shall hence-
53 forth be known and called.

The convention then adjourned until to-morrow at 9 o'clock.

EXCHANGE HOTEL, MONTGOMERY,
SATURDAY MORNING, 9 O'CLOCK, *Dec.* 19*th*, 1868.

The convention met pursuant to adjournment.

Present: D. N. Stanton, I. T. Burr, J. C. Stanton, S. A. Carleton, R. M. Patton, and R. Jemison, Jr.

No business coming then, at this time, an adjournment was had until 7 o'clock p. m.

EXCHANGE HOTEL, MONTGOMERY,
SATURDAY, 7 O'CLOCK P. M., *Dec.* 19*th*, 1868.

The convention met pursuant to adjournment.

Present: D. N. Stanton, I. T. Burr, J. C. Stanton, S. A. Carleton, R. Jemison, and R. M. Patton.

The minutes of the several meetings held on the 17th, 18th, and the morning session of the 19th inst. were severally read and approved.

The following report was received and unanimously adopted:

We, the undersigned, a committee appointed to purchase the N. E. & S. W. Ala. R. R. Co. and its property at a sale made on the 16th day of Dec., 1868, beg leave respectfully to report that they attended said sale and made a purchase thereat and have taken a deed of indenture executed by the governor of the State of Alabama and D. N. Stanton, the president of this corporation; which deed is in the words and figures following, to wit:

This indenture made and entered into on the 19th day of December, 1868, by Wm. H. Smith as governor of the State of Alabama, of the first part, and the Ala. & Chatta. R. R. Co. of the second part, witnesseth as follows to wit;

Whereas, the N. E. & S. W. Ala. R. R. Co. did on the 26th day of July, 1860, execute its mortgage to the State of Alabama, acting

through its governor, Andrew B. Moore on the R. R. of the said N. E. & S. W. Ala. R. R. Co. and all and singular its appurtenances and franchises, the grading and local work, the rolling stock of every description, including locomotives and warehouses workshops and engine-houses and fixtures belonging to said R. R. Co. to secure the payment of the sum of $218,000.00 loaned by the State of Alabama to the N. E. & S. W. Ala. R. R. Co., out of the three per cent.
54 fund and the interest thereon. And whereas, the said N. E. & S. W. Ala. R. R. Co. has made default in the payment of the said sum of $218,000.00 and the interest due thereon, and whereas, Wm. H. Smith, as governor of the State of Alabama, did after giving more than sixty days' — in a newspaper published in the city and county of Montgomery in the State of Alabama, offer the said R. R. property and franchise above described for sale at public auction on the terms following to wit;

1st. The minimum bid which will be accepted is the amount of debt due the State of Alabama and the interest thereon.

2nd. There must be paid in cash a sufficient amount to cover the cost of sale including the advertisement.

Payment beyond cost of sale will be accepted from the Wills Valley R. R. Co., or the Ala. & Chatta. R. R. Co., after the name is adopted in the unindorsed second-mortgage bond of such company.

4th. Payment will be accepted from any other corporation authorized to purchase, or natural person, or persons in securities to the extent and of like character with those specified in the next preceding article or in other good and satisfactory securities; and whereas, the Wills Valley R. R. Co. became the purchaser at the price and sum of $318,000.00 exceeding the debt of the said N. E. & S. W. Ala. R. R. Co. and the interest thereon, and whereas, the said bid of the Wills Valley R. R. Co. was the highest and best for the same; and whereas, it seems to the undersigned Gov. of the State of Alabama and the parties interested in the payment of the debt contracted by the said loan to the N. E. & S. W. Ala. R. R. Co. to accept the bid of the said Wills Valley R. R. Co.; and whereas, the said Wills Valley R. R. Co. has paid to the State of Alabama the sum and amount bid as aforesaid in satisfaction of the debt under said mortgage; and whereas, the said Wills Valley R. R. Co. has by authority of the General Assembly of the State of Alabama
55 changed its name to the Ala. & Chatta. R. R. Co.; and whereas, the said Ala. & Chatta. R. R. Co. has in consideration of the said purchase, executed its unendorsed second-mortgage bonds to the State of Alabama to the amount of $318,000.00 together with the second mortgage securing the payment of the same. Now, I, Wm. H. Smith, as governor of the State of Alabama, do hereby bargain, sell, alien and convey unto the Ala. & Chatta. R. R. Co. all and singular the property following to wit: All the said N. E. & S. W. Ala. R. R. Co. without distinction of section together with all and singular appurtenances and franchises, the grading and local work, the rolling stock of every description, including locomotives, all warehouses, together with all workshops and engine-

houses together with all fixtures of whatever nature, belonging to said R. R. Co. to have and to hold to said Ala. & Chatta. R. R. Co. and its successors and assigns forever.

Given under my hand and the great seal of the State of Alabama this 19th day of December, A. D. 1868, and subscribed also by the president of the Ala. & Chatta. R. R. Co., under the corporate seal of such company, the date above written.

WM. H. SMITH.
D. N. STANTON,
President Ala. & Chatta. R. R. Co.

Attest:
A. J. WALKER.
WM. H. SIMPSON.

STATE OF ALABAMA, }
County of Montgomery. }

I, Wm. S. Thorington, notary public and *ex officio* justice of the peace in and for the county and State aforesaid, hereby certify that Wm. H. Smith and D. N. Stanton, whose names are signed to the foregoing conveyance and who are personally known to me, acknowledged before me on this day that, being informed of
56 contents of said —, they voluntarily executed, signed, sealed, and delivered the same on the day it bears date.

Given under my hand the 9th (19th?) day Dec., 1868.

WM. S. THORINGTON,
Notary Public and ex Officio Justice of the Peace.

[U. S. internal revenue stamps amounting to $318.]

Which deed we recommend the Ala. & Chatta. R. R. Co. to accept, and to this end we report the following resolution, the adoption of which we recommend:

Resolved, That the deed hereon copied be, and the same is hereby, accepted, adopted, and ratified.

J. C. STANTON.
S. A. CARLETON.
I. T. BURR.
D. N. STANTON.

On motion of J. C. Stanton, the treasurer is hereby instructed to notify the president of the Mobile & Ohio R. R. Co. that from and after the 16th inst. they will be required to pay to this company the rents for that portion of the road extending from Meridian to York and leased by said Mobile & Ohio R. R. Co.; which resolution was unanimously adopted.

The convention then adjourned *sine die*.

R. M. PATTON, *Pres.*
A. J. WALKER,
Sec'ty pro Tem.

STATE OF NEW YORK, }
City & Co. of N. Y. }

On this 6th day of Oct., 1877, Jeremiah Richards, to me well known, appeared before me this day in person, and, being by me first duly sworn, he did depose and say that he is the secretary of the said Ala. & Chatta. R. R. Co., and as such secretary has charge of the original record books of said company, and that the foregoing is a full, true, and correct extract from the original minute
57 book of said Ala. & Chatta. R. R. Co. of all meetings held at Montgomery, Ala., on Dec. 16th, 1868, and adjourned from day to day as appeared therein.

J. RICHARDS.

Subscribed in my presence and sworn to before me this 6th day of Oct., 1877.

Witness my hand and official seal.

WM. H. CLARKSON,
Commissioner for Tenn. in New York,
117 *Broadway, New York City.*

EXHIBIT # 2.

Office of the Ala. & Chatta. R. R. Co., # 25 Merchants' exchange.

BOSTON, *August 26th*, 1870.

Daniel Duffy, Esq., A. & C. R. R. Co., Chattanooga, Tenn.

DEAR SIR: Your favor of the 22d, with accompanying proposal, was duly received and submitted to Mr. J. C. Stanton, who spoke to the president concerning the matter therein, and I am requested to say that the whole matter is referred for further consideration. If you desire the same kind of maps I have already sent to you please write me how many. These are expensive maps and we desire to be sparing in their delivery.

Very truly, ALBERT F. THAYER, *Sec't'y.*

JOHN T. KEAGY,
Commissioner.

58 EXHIBIT # 3.

Office of the Ala. & Chatta. R. R. Co., # 25 Merchants' exchange.

BOSTON, *Sept. 14th*, 1870.

Daniel J. Duffy, Esq., Ala. & Chatta. R. R. Co., Chattanooga, Tenn.

DEAR SIR: We have your favor of the 5th, which has been referred to the president, who says that he will attend to the matter of the maps in a short time.

Very truly, ALBERT F. THAYER, *Sec't'y.*

JOHN T. KEAGY,
Commissioner.

On the foregoing is endorsed: "Published by consent of parties this Jan. 9th, 1888. Chas. A. Senn, register."

D. B. MILLER
vs.
JOHN SWANN, Trustee, *et al.* } Final Decree.

This cause was submitted for decree in vacation upon the pleadings and proof as noted by the register and was *was* argued by counsel, and, being duly considered, the court is of the opinion that there is nothing in the amended bill and the additional testimony that relieves the case from the effect of the decision of the supreme court formerly rendered—80 Ala., 530—in this case; every point presented has been passed upon by the supreme court adversely to the complainants. It is therefore ordered, adjudged, and decreed that the complainant is not entitled to the relief prayed in his bill
59 and the motion to dismiss the bill for want of equity is well taken, and the bill is dismissed out of this court at the costs of the defendants, for which let execution issue.

November 12th, 1888.

THOMAS COBBS, *Chancellor.*

On the foregoing is endorsed: "Filed and enrolled this 13th November, 1888. Chas. A. Senn, register."

In the Chancery Court of Jefferson County, Ala.

D. B. MILLER
vs.
JOHN SWANN *et al.* } Agreement of Counsel.

Whereas this case has been appealed to the supreme court of the State, and the same reversed by the said supreme court, the said appeal having been taken by the defendants; and whereas the original bill was amended by the complainant after said reversal, and the said suit as amended has been decided against the complainant, and the complainant has appealed to the supreme court from the decree dismissing his bill; and whereas the record in the supreme court is very voluminous, and to have another made out will be very expensive; and whereas the additional record made by the amendment and proceedings therein is not large: Now, it is agreed by and between the solicitors of the respective parties that the register shall make out a transcript and certify the same showing all amendments, orders, and proceedings, &c., had in this cause from the time of said reversal by the supreme court up to and including the final decree, and the following proceedings are those to be included in the said transcript:

1. Motion to amend the bill and the amendment allowed and order allowing the same.

2. Answer and demurrer of the defendants.

3. Motion to retake depositions of Jno. C. Stanton and D. N. Stanton and D. J. Duffy and order of court allowing same.

60 4. Agreement of counsel as to submission of cause and order of court therein.

5. Order of submission of the cause and note of testimony.

6. Deposition of J. C. Stanton taken since the amendment.

7. Deposition of D. J. Duffy taken since the amendment.

8. Deposition of Albert F. Thayer taken since the amendment.

9. Agreement of counsel marked filed July 14th, 1888, and signed Thomas Cobbs, chancellor.

10. Final decree.

All other proceedings, depositions, &c., are to be left out of the said transcript to be made by the register.

And it is further agreed that the said transcript, when so made out by the register, shall be, together with the said record in the supreme court on the former appeal, considered and taken as a complete transcript of the record in this suit, and the supreme court may use the same as if a regular transcript had been made out. The former appeal having been in the name of defendants as appellants, the said transcript in the supreme court to be considered as changed as to show that the said D. B. Miller is now the appellant, and in case of any appeal to the Supreme Court of the United States that shall appear.

WATTS & SON AND JOHN PHELAN,
Sol's for D. B. Miller.
SAMUEL F. RICE AND SMITH & LOWE,
Sol's for Respondents.

On the foregoing is endorsed: "Filed in office this 15th day of December, 1888. Chas. A. Senn, register."

61 In the Chancery Court of Jefferson County, Alabama, at Birmingham, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*
} Security for Costs.

The complainant in said cause having taken an appeal to the supreme court of the State from the decree rendered in said cause, we hereby acknowledge ourselves as security for the costs of said appeal.

Witness our hands this 14th November, 1888.

JOHN PHELAN.
ELLIS PHELAN,
By JOHN PHELAN,
Ag't & Att'y.
JAS. E. HAWKINS.
D. B. MILLER,
By JOHN PHELAN, *His Att'y.*

On the foregoing is endorsed: "Approved this 15th November, 1888. Chas. A. Senn, register."

THE STATE OF ALABAMA, }
Jefferson County. }

In Chancery Court.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to notify John Swann and John A Billups or Samuel F. Rice or Smith & Lowe, their solicitors of record, that the complainant, D. B. Miller, in a certain suit pending in this court, wherein D. B. Miller is complainant and John Swann, trustee, *et al.* are defendants, has taken an appeal to the December term, 1888, of the supreme court of Alabama from a decree rendered in said cause.

CHAS. A. SENN, *Register.*

On the foregoing is endorsed: We accept service of the within notice. Dec. 16th, 1888. Smith & Lowe, sol's for def'ts except Phelan.

62 THE STATE OF ALABAMA, }
Jefferson County. }

I, Chas. A. Senn, register in chancery in and for the 16th district of the northwestern chancery division of Alabama, do hereby certify that in the cause of D. B. Miller *vs.* John Swann, trustee, *et al.*, which was tried and determined in said chancery court for the 16th district of northwestern chancery division of Alabama, in vacation, after spring term, 1888, an appeal was taken on the 14th day of November, 1888, by the complainant, D. B. Miller, from the decree of the court rendered therein to the December term, 1888, of the supreme court of the State of Alabama, and that the foregoing pages, numbered from one to 118, inclusive, contain a full and complete transcript of the record and proceedings in said cause as specified and set out in the agreement of counsel filed in this court and made a part of this transcript; that the names of the parties as sureties for costs are D. B. Miller, John Phelan, Ellis Phelan, and Jas. E. Hawkins; that the copy of citation of appeal and service thereof is also contained in this transcript.

Given under my hand and the seal of the said chancery court this 17th day December, 1888.

CHAS. A. SENN, *Register.*

Filed February 4th, 1889.

JOHN W. A. SANFORD, *Clerk.*

63 Be it remembered that on the 15th day of July, 1884, complainant filed in the office of the register in chancery for the eighth district of the western chancery division of Alabama his bill of complaint in words and figures as follows, viz:

To the Hon. Thomas Cobbs, chancellor of the western chancery division of Alabama, sitting for Jefferson county, in said division:

Your orator, D. B. Miller, a citizen of Covington, in the State of Kentucky, files this his bill of complaint against John Swann and others hereinafter named, and he shows unto your honor—

1. That heretofore, viz., before and on the 13th day of Sept., 1870, the Alabama & Chattanooga railroad, a corporation under the laws of Alabama, was the owner of a large number of parcels of lands lying in several counties in this State, and amongst others of the following land, lying in Jefferson county, in this State, viz: The northwest quarter (N. W. ¼, sec. 5, T. 18, R. 2 W.) of section 5, township 18, range 2 west; the southeast quarter of the southeast quarter (S. E. ¼ of S. E. ¼) of section 1, township 18, range 3 west, containing two hundred acres, more or less. On the 6th of October, 1868, the said Alabama & Chattanooga Railroad Co. was incorporated and made a body corporate by act of the General Assembly of Alabama, a copy of which act of incorporation is found on pages 207, 208, and 209 of the Acts of 1868 and made part of this bill. The act of the General Assembly of Alabama passed and approved on the 17th November, 1868, and found on pages 345, 346, 347, and 348 of the Acts of 1868, entitled An act relating to the Wills Valley R. R. Co. and the Northeast & Southwest Ala. R. R. Co., is likewise made a part of this bill of complaint and reference thereto prayed as often as necessary. The Northeast & Southwest Ala. R. R. Co., referred to in the last-named act was incorporated by the General Assembly of Alabama on the 12th December, 1853, commencing on
64 page 270 of Acts of 1853–'4, and it is made a part of this bill. The Wills Valley R. R. Co., referred to in the said acts of Oct. 6th, 1868, and 17th November, 1868, was incorporated by act of the General Assembly of Alabama on the 3d of February, 1852, and is found in acts of 1852–'*1*, commencing on page 178 of said acts, and the said act is likewise made a part of this bill, with reference prayed thereto as often as may be necessary.

2. That heretofore, on the 13th day of Sept., 1870, the said Alabama & Chattanooga R. R. Co., having full power to do so, sold to one Joab Bagley, then a citizen of said Jefferson county, by its duly authorized agent, the following of said lands, viz., S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and the W. ½ of N. W. ¼ and the N. E. ¼ of N. W. ¼ of section 5, township 18, range 2 west, at and for the agreed price of two dollars and one-half per acre, one-fourth of which he paid cash and executed his promissory notes for the balance, viz., one for one hundred dollars, payable one year after date, and two others for one hundred dollars each, one payable two years and the other three years after date, each bearing interest from date, and delivered said promissory notes to said Ala. & Chatta. R. R. Co.; and thereupon the said Ala. & Chatta. R. R. Co., through its duly authorized agent, executed and delivered to the said Joab Bagley a contract in writing, of which Exhibit A, hereto attached, is a copy and made part of this bill. At the time of the execution of said last-named instrument and inserted therein the Ala. &

Chatta. R. R. Co. reserved to itself the minerals in and upon said lands; but afterwards, viz., on the 24th of January, 1871, the said Bagley, for a valuable consideration then paid, bought of said Ala. & Chatta. R. R. Co. the minerals and mineral privileges so reserved, and then and there the reservation in the body of said contract was erased, and the said company, through its duly authorized agent, Daniel J. Duffy, inserted in the body of said written contract
65 the following words, viz: "The said Joab Bagley having purchased the right to the minerals and mining privileges upon said lands, the same are released by —— this January 24th, 1871, the said Ala. & Chatta. R. R. Co. thereby intending to quitclaim and release to said Bagley all the right which had been in the first trade reserved to said company." The said contract in writing, a copy of which is contained in Exhibit A, hereto attached as a part of this bill, was placed on record in office of judge of probate of said Jefferson county on the 19th day of Oct., 1874, as will fully appear by endorsement thereon, seen in said Exhibit A.

3. That afterwards, viz., on the 24th day of January, 1871, the said Ala. & Chatta. R. R. Co., through its duly authorized agent, Daniel J. Duffy, sold to said Joab Bagley the following-described lands, lying in said county of Jefferson, viz., the S. E. ¼ of N. W. ¼ of sec. 5, township 18, range 2 west, at and for the price of two dollars and a half per acre, and the said Bagley then and there paid twenty-five dollars of said purchase-money cash to the said Ala. & Chatta. R. R. Co. and executed to it his three promissory notes, each for twenty-five dollars, payable, with interest from date, in one, two, and three years respectively; and the said Ala. & Chatta. R. R. Co. executed and delivered to said Joab Bagley, by its duly authorized agent, said Duffy, its entry-takers' certificate, a copy of which is hereto attached as Exhibit B and made part of this bill; said certificate was placed on the record of the probate office of Jefferson county on the 19th of Oct., 1874.

4. That afterwards, viz., on the 27th of January, 1871, the said Joab Bagley and his wife made and executed their deed to James H. McKee, James W. Fuller, Jr., and Wm. R. Thomas and James Thomas, iron manufacturers of car wheels under the name and style of McKee, Ful-er & Co., the following-described lands, being a part of those purchased by the said Bagley from the said Ala. & Chatta. R. R. Co., viz., the N. W. ¼ of sec. 5, township 18, range 2 west.
66 The deed of said Bagley and wife to the said persons was duly recorded in the office of the judge of probate of said Jefferson county on the 26th of April, 1871, a copy of which deed, with its endorsements thereon, is hereto attached as Exhibit C and made a part of this bill.

5. That afterwards the said Joab Bagley and wife sold and conveyed, viz., on the 7th of Oct., 1871, to James H. McKee, James Thomas, James W. Fuller, Jr., Wm. R. Thomas, and Joseph J. McKee, partners under the name of McKee, Thomas & Co., the following-described land, being a part of that sold by said Ala. & Chatta. R. R. Co. to said Joab Bagley, viz., the S. E ¼ of S. E. ¼ of section 1, township 18, range 3 west, which said deed last mentioned

was duly recorded in the office of the judge of probate of Jefferson county on the 14th of November, 1871, a copy of which, with the endorsements thereon, is hereto attached as Exhibit D and made a part of this bill.

6. That afterwards, on the 10th of January, 1873, the said James McKee and wife, James Thomas and wife, James W. Fuller, Jr., and wife, and Wm. R. Thomas and wife and Joseph J. McKee sold and conveyed to the Jefferson Iron Company, a corporation under the laws of Alabama, located and doing business at Irondale, in said Jefferson county, the following-described lands, viz., the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, being a part of the said land sold to said Joab Bagley by the said Ala. & Chatta. R. R. Co., which said deed was duly recorded in the office of the judge of probate of Jefferson county on the 21st of November, 1874, and a copy of the said deed, with its endorsements thereon, is hereto attached as Exhibit E and made a part of this bill.

7. That heretofore, viz., on the 10th of January, 1873, the said James H. McKee and wife, James Fuller, Jr., and wife, Wm. R. Thomas and wife, and James Thomas and wife sold and conveyed unto the said Jefferson Iron Co. the following described lands, being a part of the lands so sold to said Joab Bagley by the said
67 Ala. & Chatta. R. R. Co., viz., the N. W. ¼ of section 5, township 18, range 2 west, which deed was duly recorded in the office of the judge of probate on the 21st of November, 1874, and a copy of which, with the endorsements thereon, is hereto attached as Exhibit F and made a part of this bill.

8. That afterwards, viz., on the 9th of November, 1874, the said Jefferson Iron Company, by its duly authorized agent and officers, sold and conveyed to your orator the said lands, viz., the N. W. ¼ of section 5, township 18, range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, together with several other parcels of land, but said conveyance was upon condition set forth therein and was, in fact, a mortgage; which deed was duly recorded in the office of judge of probate of said Jefferson county on the 20th of November, 1874, and said deed, with its endorsements thereon by copy, is made Exhibit G, hereto attached and made a part of this bill.

9. That afterwards, viz., on the 10th day of March, 1880, said Jefferson Iron Company having failed to make payment as in said mortgage provided, its duly authorized agent executed an instrument in writing to the said D. B. Miller, your orator, authorizing a foreclosure of said mortgage, a copy of which is hereto attached as Exhibit H, with its endorsements, as a part of this bill.

10. That afterwards, viz., on the 11th day of May, 1880, the said D. B. Miller, after having advertised as required by the said last-mentioned instrument in writing, sold at public outcry, in the city of Birmingham, in the said county of Jefferson, *sold* the said N. W. ¼ of section 5, township 18, range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, together with other lands, and at said sale the said D. B. Miller, your orator, as he was authorized by the said power of sale, became the purchaser of the said

specially named lands and others included in said mortgage
68 at and for the sum of five thousand dollars, being the highest and best bid therefor; which said sum was credited upon the said mortgage, it being much less than the amount due upon the said mortgage. The said Jefferson Iron Company, well knowing of the terms of said sale and the fact of purchase by your orator, has acquiesced therein and has never made any objection to your orator having purchased at said sale, and your orator is now the owner of the said lands under the said conveyance and purchase.

11. That the said Joab Bagley when he bought the said land of said Ala. & Chatta. R. R. Co. went into possession thereof and paid taxes thereon whilst he so owned the same, and the said McKee, Fuller & Co. and said McKee, Thomas & Co. went into possession of said lands under their purchase from said Bagley and likewise paid the taxes thereon for the year 1872, and after the sale to said Jefferson Iron Company it continued the same possession and to list and pay taxes thereon for the years 1873, 1874, and for each year down to 1880, inclusive, and since that time your orator has paid the taxes for the years 1881, 1882, and 1883, and orator has since his purchase at said mortgage sale *has* claimed to be the owner and possessor thereof.

12. That the said Joab Bagley died in Jefferson county in the year 1875. The said Bagley before his death, as complainant is informed and believes and upon such information he avers, paid to the said Ala. & Chatta. R. R. Co. all the purchase-money agreed by him to be paid for said lands. Now, that said Bagley is dead, orator cannot affirm with certainty that the whole of said purchase-money was paid by said Bagley, but orator has been furnished with a letter written by the said Daniel J. Duffy (who was then the duly authorized agent of the said Ala. & Chatta. R. R. Co.) on the 10th of February, 1873, which states that there was then a balance of one hundred and five dollars due for said land and — which information and other information orator avers at that time,
69 viz., the 10th of February, all the purchase-money due for said land by said Bagley, except the said one hundred and five dollars, had been paid, and orator avers that thereby, after that time, as he is informed and believes, this balance was *fuly* paid, and certainly before the death of said Bagley. The promissory notes before named constituted the evidence of the amount due on the purchase-money for said land, and if they had not been paid before the death of the said Joab Bagley they would in all human probability have been presented to the administrator of said Bagley for payment. Orator avers that shortly after the death of said Bagley administration was granted on his estate by the probate court of Jefferson county to Wm. J. Eubank, who administered said estate down to his death, in 1879, and orator avers that no note or other evidence of debt has ever been presented to said administrator or been filed in the probate court of Jefferson against said estate by the said Ala. & Chatta. R. R. Co. or by any one claiming through said company, and orator avers that none of the promissory notes executed and delivered to said Ala. & Chatta. R. R. Co. has ever been

presented to the said administrator or to any representative of said estate, although about nine years have elapsed since the death of said Bagley and since administration was granted on his estate, and none has been filed in the probate court of Jefferson against his said estate. After the death of said Eubank letters of administration *de bonis non* have been granted upon said estate to one Wm. J. Bass, and orator avers that none of said notes have ever been presented to him, and orator avers that no steps have been taken to enforce any lien upon said land for the payment of the purchase-money of said land. Orator therefore avers that the said Joab Bagley, before his death, fully paid the purchase-money agreed to be paid for the said lands; but if orator is mistaken in this, then he is ready and willing and here offers to pay any amount which may be
70 ascertained to be due for the purchase-money of said land, if, in fact, there be anything due.

13. That the said Ala. & Chatta. R. R. Co. never made any deed of conveyance to said Bagley for said land and has never made any deed of conveyance for said lands to any purchaser from the said Bagley or to any one holding through him. The said Bagley's deed hereinbefore named contained covenants of general warranty of title and warranty of seizin and against incumbrances. Why no deed was made before the full payment of the said purchase-money orator is not informed, but so it is. The said Joab Bagley never received any deed of conveyance for said land, and the legal title is either in the Ala. & Chatta. R. R. Co. or in its assignees, who hold subject to the superior rights of the said Bagley and of his assignees and subject to the superior rights of orator to said land, and orator avers that he is entitled to have a conveyance of the legal title to said land by reason of the facts herein stated.

14. That heretofore, viz., on the 16th day of July, 1883, orator and wife made deed of conveyance to one Ellis Phelan, who then and now resides in said Jefferson county, for the said S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and the said Ellis Phelan is in the actual possession of the same and has been since he bought from orator, viz., on the said 16th of July, 1883. In said deed to Phelan orator expressly reserved, however, exclusive right to the iron, coal, and other minerals in and upon said land, with all the necessary privileges for mining on said land and the right of way for rail and tram ways for mining purposes to and through any portion of said land so conveyed to said Phelan.

15. That the said lands hereinbefore described as having been sold to Joab Bagley by the said Ala. & Chatta. R. R. Co. form a part of the land granted and conveyed to the State of Alabama by the act
71 of Congress of the United States approved June 3d, 1856, entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State;" which act of Congress is here referred to and made a part of this bill. Said act of Congress passed March 3d, 1857, and reference is here made to it as a part thereof. On the 10th day of April, 1869, the Congress of the United States passed "An act to renew certain grants of land to the State of Alabama," and the

said land- hereinbefore described were and are covered by said last-named act of Congress. The said lands were by the State of Alabama assigned and set apart to the said Ala. & Chatta. R. R. Co. after the last-mentioned act of Congress was passed.

16. That afterwards, viz., on the 14th day of Feb., 1870, the General Assembly of Alabama passed an act entitled "An act to loan the credit of the State of Alabama to the Alabama & Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama;" which said last-named act of the General Assembly of Alabama is found on pages 89, 90, 91, and 92 of Acts of 1869–'70 and is made a part of this bill, with leave to refer thereto as often as may be necessary the same as if it was copied and made a part of this bill by exhibit.

After the passage of last-named act of the General Assembly of Alabama the said Ala. & Chatta. R. R. Co. executed a mortgage to the State of Alabama under the provisions of said last-named act of the General Assembly of Alabama to secure the payment of two millions of dollars loaned by said State to the said Ala. & Chatta. R. R. Co. heretofore, viz., on the 2d of March, 1870, and the said mortage, amongst other lands conveyed by said mortgage, — the land herein described as having been sold to Joab Bagley were included; a copy of said mortgage to the State of Alabama is hereto attached as Exhibit I and made a part of this bill.

72 17. That the said Ala. & Chatta. R. R. Co. failed to pay the said money back to the said State of Alabama according to the terms of the said mortgage and made default; that on the petition and at the suit of W. A. C. Jones, then a creditor of the Ala. & Chatta. R. R. Co., the said Ala. & Chatta. R. R. Co. was put in bankruptcy and was in said suit declared to be a bankrupt by the United States district court sitting for the — of Alabama. The estate of the said Ala. & Chatta. R. R. Co. was administered in the said United States court and all the lands covered by the said mortgage were sold by the decree of the said United States court hereto, viz., —, and at said sale the State of Alabama bought the said lands, including the lands herein described as having been sold to Joab Bagley.

18. That afterwards, heretofore, viz., on the 8th day of February, 1877, under the "debt-settlem*emtn* act" of the General Assembly, found on pages 130–'49, Acts of 1875–'6, approved the 26th of Feb., 1876, the State of Alabama conveyed to John Swann and John A. Billups, trustees, all the lands and property purchased by the State of Alabama at said bankrupt sale, and which the State claimed and held under the said mortgage of the said Ala. & Chatta. R. R. Co. to the State, including, amongst others, the land hereinbefore described as having been sold to the said Joab Bagley. The said conveyance to said John Swann and John A. Billups, trustees, was, however, subject to limitations and conditions therein named and likewise in the said debt-settlement act, and amongst other limitations and conditions were the following, viz: But where sales of said lands or any portion thereof have heretofore been made to purchasers in good faith under the authority reserved to said R. R. Co.,

as stated in said act called the debt-settlement act, such trustees shall make title thereto where not already made, but shall collect the purchase-money therefor when not already paid and all sums, part of said purchase-money, remaining unpaid and be enti-
73 tled to all the securities for the payment thereof.

19. That in the said mortgage made by the said Ala. & Chatta. R. R. Co. to the State of Alabama the right and privilege of selling the land covered by said mortgage was reserved to said Ala. & Chatta. R. R. Co. on condition that said company should appropriate the proceeds of said sales to the payment of the said first-mortgage bonds—*i. e.*, the first-mortgage bonds to the State of Alabama.

A copy of said deed to said Swann & Billups, trustees, orator cannot set forth, the same not having been recorded and no copy thereof or duplicate thereof being found amongst the public or private papers belonging to State of Alabama, but orator avers that said John Swann and said Billups or one of them has the original thereof and can produce the same, and orator prays that they may be required to produce the same or an accurate copy thereof be attached to their answer to this bill.

20. That under an act of the General Assembly on the 23d of February, 1883, and found on pages 62, 63, 64, 65, and 66, Acts of 1882 and 1883, the said John Swann, in behalf of the bondholders mentioned in said last-named act, compromised and settled with the State in accordance with said last-named act by paying into the treasury of the State a large sum of money, viz., the sum of fifty thousand dollars.

And thereupon the State, through its duly authorized officers and agents, released the said Swann and the bondholders from the payment of what was coming to the State under the contract with the State and said Swann and Billups.

21. That the said Swann and Billups, trustees, accepted the said conveyance to them by the State of Alabama on the condition that nothing contained in the conveyance should be construed to impair or affect any existing legal or equitable right of any purchaser who purchased any portion of said lands, viz., the lands covered by the mortgage of the Ala. & Chatta. R. R. Co. to the State of Ala-
74 bama, in good faith, under and pursuant to the authority of an act of the legislature of this State approved February 11th, 1870, entitled "An act to loan the credit of the State to the Ala. & Chatta. R. R. Co. for the purpose of expediting the construction of the railroad of said company within the State of Alabama;" and the said Swann and Billups accepted the conveyance to them with conditions in substance the same as to the rights of purchasers under the said Ala. & Chatta. R. R. Co.

22. That the said Joab Bagley bought the said lands specially described as being sold to him from the said Ala. & Chatta. R. R. Co. in good faith and paid the money to the said railroad company, as hereinbefore stated and set forth.

23. That the said John Swann and John A. Billups have refused to recognize the rights of the said Joab Bagley and of your orator,

derived as herein set forth, and refused to make title to the said land.

24. That heretofore, viz., on or about the 19th of Oct., 1883, the said Swann & Billups, ignoring the rights of orator and of the said Phelan, who holds under orator, as before set forth, commenced their action of ejectment against said Phelan to recover the lands so sold by orator to said Phelan, together with all the rights, privileges, and appurtenances thereunto belonging, including the mineral and mining privileges, in the circuit court of Jefferson county, where the same is now pending and undetermined.

25. That one John N. Jenkins, under some contract with said Swann and Billups, has gone into possession of the N. W. ¼ of the N. W. ¼ of section 5, township 18, range 2 west, and claims the same, but orator avers that, by whatever contract the said Jenkins claims, his rights are subsequent and subordinate to those of the said Joab Bagley and of orator.

26. That one Julia B. Berry claims to have a deed from said Swann and Billups to the S. E. ¼ of the N. W. ¼ of said sec-
75 tion 5, township 18, range 2 west, purporting to be dated at no time, but was recorded in the probate court of Jefferson county on the 9th of Feb., 1884. Orator is not informed where said Julia resides. He has made diligent inquiry as to her residence or whereabouts, but has not been able to learn anything about her or whether there is such a person in being, if there be such a person. Orator avers she is a non-resident of Alabama. She is not now and never has been in the possession of said land purporting to be conveyed to her. Orator avers that whatever title she has is long subsequent to that of the said Bagley and of orator and is subordinate and inferior thereto.

27. That one W. J. Van Kirk, who resides at Pensacola, Florida, claims to have a deed for the N. E. ¼ of N. W. ¼ of said section 5, township 18, range 2 west. Said deed purports to have been made by said Swann and Billups the 3rd of January, 1884. Whatever may be the claim of said Van Kirk to the said land is long subsequent to and is subordinate and inferior to the rights of orator in the said lands.

28. That one E. A. Taylor, who resides in Jefferson county, claims some interest in the N. W. ¼ of the N. W. ¼ — said section 5, township 18, range 2 west, and orator is informed and on such information charges that said Taylor is in possession thereof under some claim derived from the said Swann and Billups; which said claim or title of the said Taylor, whatever it may be, is subsequent, subordinate, and inferior to the rights of orator in the premises.

29. That one Wm. S. Winsted, a resident of said Jefferson county, claims some interest in a part of the N. W. ¼ of section 5, township 18, range 2 west; what orator does not know. He is occupying a part thereof under some claim derived from the said Swann and Billups. Whatever his claim may be it is subsequent, subordinate, and inferior to the rights of orator in the same.

30. That the said Swann and Billups, the said Jenkins,
76 Julia B. Berry, W. J. Van Kirk, W. S. Winsted, and E. A.

Taylor derived whatever claims they have with notice of the rights of your orator, and all of the said persons except the said Swann and Billups are no purchasers for value, and the said Swann and Billups knew of the rights of said Joab Bagley and of orator before they derived their title from the State of Alabama, and the said State of Alabama, when it purchased under the decree of the said U. S. district court, knew of the rights of the said Bagley, and when it sold to the said Swann and Billups, trustees, provided for and reserved the legal or equitable claims of all persons who had bought of the Ala. & Chatta. R. R. Co. in good faith.

31. That the said Swann resides in New York city, N. Y., is over the age of twenty-one years; that said Billups resides in Pickens county, in the State of Alabama, is over twenty-one years old; that said Jenkins resides in Jefferson county, Ala., is over twenty-one years old; that said Julia B. Berry is over twenty-one years old; said W. J. Van Kirk is over the age of twenty-one years and resides in the city of Pensacola, Florida; that said Taylor and said Winsted both reside in Jefferson county, Ala., and are each over the age of twenty-one years; that the said Ellis Phelan is over the age of twenty-one years and resides in said Jefferson county.

The premises considered, your orator prays that the said John Swann and the said Billups, trustees, and the said W. J. Van Kirk, John M. Jenkins, Julia B. Berry, E. A. Taylor, W. S. Winsted, and Ellis Phelan be made parties defendant to the bill of complaint, and orator prays for appropriate process to be issued out of the chancery court of Jefferson county, and proper publication be made as to the said non-residents of Alabama, to be served on and published against the said parties, requiring them and each of them to appear before your honor at the next term of the chancery court to be held for Jefferson county, and then and there stand
77 to and abide such orders as your honor may make in the premises, and that each of them make answer to the allegations of this bill of complaint within the time prescribed by the rules of your honor's court; and may it please your honor to enjoin the said Swann & Billups from prosecuting their said action of ejectment against said Ellis Phelan until the farther orders of your honor, and may it please your honor, on the final hearing of the case, to decree that your orator is entitled to the lands claimed by him as herein set forth, and that all title thereto be divested out of the said Swann and Billups and out of those who claim under them or either of them, and that all title thereto be vested in orator.

That orator prays that an account be taken to ascertain what amount, if any, the said Joab Bagley at his death was indebted to said Ala. & Chatta. R. R. Co., and when the same is so ascertained orator is ready and willing to pay the same to whomever is ascertained to be entitled to the same, and that on the payment of such ascertained amount the title to said land be vested in your orator.

And if in anything orator has mistaken his rights in the premises and his prayers for relief may it please your honor on the final

hearing to grant your orator whatever relief he may be entitled to according to equity and good conscience.

And as in duty, &c.

WATTS & SON AND
SHARPE & WEATHERLY,
For Complainant.

NOTE.—Each of the defendants is required to answer the allegations of this bill, but oath to their respective answers is waived.

WATTS & SON,
For Complainant.

78 EXHIBIT A.

No. 30. Entry-taker's office, Ala. & Chatta. R. R. Co.

CHATTANOOGA, TENN., *Sept. 13th*, 1870.

This is to certify that I, Daniel J. Duffy, commissioner for the sale of Alabama & Chattanooga Railroad Company, successors to the Wills Valley Railroad Company, for the sale of lands granted to said company by act of Congress approved June 3d, 1856, and subsequent act of Congress to the Ala. & Chatta. R. R. Co., reviving said act of June 3d, 1856, approved April 10th, 1869, have this day sold to Joab Bagley, of Elyton, of the county of Jefferson, State of Alabama, the (S. E. ¼ of S. E. ¼ section 1, township 18, range 3 west, and W. ½ of N. W. ¼ N. E. ¼ of N. W. ¼ of section 5, township 18, range 2 west) of section- 1 and 2, in township 18, of range- 2 and 3 west, containing one hundred and sixty acres, situate in Jefferson county, Ala., according to the original survey, at two dollars and one half per acre, amounting to four hundred dollars, one-fourth paid in hand and the remaining due and to be paid in three equal instalments, with legal interest from date thereof.

This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company, by its president, secretary, or other duly authorized agent, when the full amount of the purchase-money with interest is paid.

And it is further agreed by the said Joab Bagley that in accepting this certificate, if any portion of the purchase-money and interest shall remain unpaid sixty days after the last instalment is due, the entry-taker of the said Ala. & Chatta. R. R. Co. may, upon giving thirty days' notice in three public places, one of which shall be his office and the remaining two in the county in which said land is situate, proceed to sell said above-described land in front of his office to the highest bidder for cash in hand without any fur-

79 ther or other proceedings than the above.

Witness my hand and seal the day and date last above written.

The said Bagley having purchased the right to the minerals and

mining privileges upon said lands, the same are released by — this day of January 24th, 1871.

THE ALABAMA & CHATTANOOGA
R. R. CO.,
By DANIEL J. DUFFY, *Land Commissioner.*

I accept the provisions of the above certificate freely and voluntarily.

Witness my hand and seal the 13th day of Sept., 1870.

J. BAGLEY. [L. S.]

Signed — sealed in presence of *us*—
ARTHUR B. PAINE.

Filed for record in my office on the 19th day of October, 1874.

J. C. MORROW,
Judge of Probate.

And this deed was, on the 19th day of October, 1874, duly recorded in Deed Book, volume 21, pages 498 and 499.

J. C. MORROW,
Judge of Probate.

Endorsed on the back of foregoing exhibit is the following: "Entry-taker's certificate No. 30, A. & C. R. R. to Joab Bagley."

EXHIBIT B.

Alabama & Chattanooga R. R. Co.
to
Joab Bagley.

No. 257. Entry-taker office, Ala. & Chatta. R. R. Co.

CHATTANOOGA, TENN., *January 24th*, 1871.

This is to certify that I, Daniel J. Duffy, land commissioner of the Ala. & Chatta. R. R. Co., successors to the Wills Valley
80 R. R. Co., for the sale of lands granted to said company by act of Congress approved June 3d, 1856, and subsequent act of Congress to the Ala. & Chatta. R. R. Co., reviving said act of June 3d, 1856, approved 10th day of April, 1869, have this day sold to Joab Bagley, of the county of Jefferson, State of Alabama, the S. E. ¼ of the N. W. ¼ of section 5, township 18, range 2 west, containing forty acres, situated in Jefferson county, Alabama, according to the original survey, at two dollars and one-half per acre, amounting to one hundred dollars, twenty-five dollars paid in hand and balance to be paid in three equal instalments, with legal interest from date thereof.

This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company,

by its president, secretary, or other duly authorized agent, when the amount of the purchase-money with its interest is paid.

And it is further agreed by the said Joab Bagley that on accepting this certificate, if any purchase-money and interest shall remain unpaid sixty days after the last instalment is due, the entry-taker of the said Ala. & Chatta. R. R. Co. may, upon giving thirty days' notice in three public places, one of which shall be this office and the remaining two in the county in which the said land shall be situate, proceed to sell said above-described land in front of his office to the highest bidder for cash in hand without any further or other proceedings than the above.

Witness my hand and seal the day and date last above written.

THE ALABAMA & CHATTANOOGA
R. R. CO.,
By DANIEL J. DUFFY, *Land Commissioner.*

I accept the provisions of the above certificate freely and voluntarily.

Witness my hand and seal this 24th day of January.

J. BAGLEY. [L. S.]

81 Filed for record in my office on the 19th day of October, 1874.

J. C. MORROW,
Judge of Probate.

And this deed was, on the same day of the month and year, duly recorded in Deed Book, volume 21, pages 500 and 501.

J. C. MORROW,
Judge of Probate.

Endorsed on the foregoing exhibit is the following: A. & C. R. R. to Joab Bagley.

EXHIBIT C TO BILL.

Joab Bagley
to
McKee, Fuller & Co. } (Deed.)

This indenture made and entered into this twenty-seventh day of January A. D. one thousand eight hundred and seventy-one, by and between Joab Bagley and Rebecca E. Bagley, his wife, of the county of Jefferson and the State of Alabama, of the first part and James H. McKee, of the city of Philadelphia, James W. Fuller, Jr. and Wm. R. Thomas, of the county of Lehigh and James Thomas of the county of Carbon and State of Pennsylvania, iron manufacturers, engaged in the manufacture of car wheels, under the firm name and style of McKee, Fuller & Co., of the second part, witnesseth;—That the said party of the first part, for and in consideration of the sum of three thousand four hundred dollars to them in hand paid

by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and do by these presents grant, bargain, sell and convey unto the said party of the second part and to their heirs and assigns forever, the following-described tracts, or parcels of land, to wit; The northwest quarter of section 5 in township 18 of range 2 west, and, also, the northeast quarter of the southwest quarter and ten acres square in the northwest corner of the southeast quarter of the southwest quarter of section 6, township 18, range 2 west, lying in Jefferson county
82 about two and a half miles southeast of Elyton on Red mountain, it being iron lands containing two hundred and ten acres, more, or less. To have and to hold the same together with the tenements and appurtenances, mines and minerals thereunto belonging, or in anywise appurtaining to the said parties of the second part, their heirs and assigns forever.

And the said party of the first part, for themselves, their heirs, executors and administrators do hereby warrant and will forever defend the title to the above-described and hereby granted premises free from the claim of themselves, said party of the first part, and against the claims of all other persons whomsoever.

In testimony whereof, said party of the first part have hereunto set their hands and affixed their seals, the day and date above written.

J. BAGLEY. [SEAL.]
R. E. BAGLEY. [SEAL.]

Signed, sealed, &c., in presence of us—
B. E. GRACE.
N. E. BAGLEY.

THE STATE OF ALABAMA, }
Jefferson County. }

I, J. C. Morrow, judge of probate in and for said county, hereby certify that B. E. Grace, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day and, being sworn, stated that J. Bagley and his wife, R. E. Bagley, the grantors in the conveyance, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date; that he attested the same in the presence of the grantors and of the other witness, and that such other witness subscribed his name as a witness in his presence.

Given under my hand this day, the 22d of April, 1871.

83 J. C. MORROW,
Judge of Probate.

Filed for record in my office on the 22d day of April, 1871.
J. C. MORROW,
Judge of Probate.

Endorsed on the foregoing exhibit is the following: Joab Bagley and wife to McKee, Fuller & Co.

Exhibit D.

This indenture made and entered into this 7th day of October, A. D. one thousand eight hundred and seventy-one, between Joab Bagley and Rebecca Bagley his wife, of the county of Jefferson and State of Alabama, of the first part and James H. McKee of the city of Philadelphia, Pa. James Thomas of the county of Jefferson aforesaid, James W. Fuller, Jr. and Wm. R. Thomas of the county of Lehigh, State of Pennsylvania and Joseph J. McKee of Jefferson county, Alabama, manufacturers and merchants doing business at Irondale under the firm name and style of McKee, Thomas & Co. of the second part, witnesseth ;—That the said party of the first part for and in consideration of the sum of two thousand, five hundred dollars, to them in hand paid before the sealing and delivery of these presents, by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and doth by these presents bargain, sell and convey in fee simple unto said parties of the second part, the following-described tracts, or parcels of land, to wit; One hundred and sixty acres of timber land known and described at the General Land Office, as the N. E. ¼ of section 7, township 18, range 2 west containing about one hundred and sixty acres. Also, forty acres of iron land on the Red mountain near the above and known and designated as the S. E. ¼ of the S. E. ¼ of section 1, township 18, of range 2 west. All of said land lying and being in all about two hundred acres, be the same more, or less. To have and to hold the same together with the tenements and ap-
84 purtenances thereunto belonging, or in anywise appertaining unto the said party of the second part and their heirs and assigns and successors forever. And the said party of the first part for themselves, their heirs, executors and administrators, do hereby warrant and will forever defend the title to the above-described and hereby granted lands, free from the claim of themselves, said parties of the first part, unto the said parties of the second part and against the claims of all and every other person whomsoever.

In testimony whereof, the said parties of the first part have hereunto set their hand- and affixed their seals, the day and date above written.

Signed, sealed, &c., in presence of us as to Mr. Bagley.

J. BAGLEY. [SEAL.]
R. E. BAGLEY. [SEAL.]

The State of Alabama, }
Jefferson County. }

I, W. J. Mims, a notary public in and for said county, hereby certify that Joab Bagley and Rebecca Bagley, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the con-

tents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this 9th day of October, A. D. 1871.

W. J. MIMS,
Notary Public.

Filed for record in my office on the 14th day of November, 1871, and was the same day recorded in Deed Book, volume 17, pages 351, '2.

J. C. MORROW,
Judge of Probate.

Endorsed on the foregoing exhibit is the following: Joab Bagley and wife to McKee, Thomas & Co.

85 EXHIBIT E.

James H. McKee and others
to
The Jefferson Iron Company.

This indenture made and entered into, this 10th day of January, A. D. one thousand, eight hundred and seventy-three, by and between James H. McKee of the city of Philadelphia and the State of Pennsylvania and Mary, his wife, James Thomas of the county of Jefferson and State of Alabama, and Mary Ann, his wife, James W. Fuller, Jr. and Catherine, his wife, and Wm. R. Thomas and Martha, his wife, of the county of Lehigh and State of Pennsylvania, and Joseph J. McKee of the county of Jefferson and State of Alabama, all of the one part and the Jefferson Iron Company of Jefferson county, Alabama of the second part, witnesseth; That the said parties of the first part, for and in consideration of the sum of two thousand, five hundred dollars, to them in hand paid at and before the sealing and delivery of these presents by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey in fee simple unto the said party of the second part, its successors and assigns, the following-described tracts or parcels of lands, to wit; One hundred and sixty acres of timbered land known and described at the General Land Office as the N. E. ¼ of section 7, township 18, of range 2 west, containing about one hundred and sixty acres. Also, forty acres of iron land on the Red mountain, near the above, and known and described as the S. E. ¼ of the S. E. ¼ of section 1, township 18, of range 3 west, all of said lands lying and being in Jefferson county, State of Alabama, and containing in all about two hundred acres, be the same more or less. To have and to hold the same together with the tenements and appurtenances thereunto belonging, or in anywise appertaining unto them, the said party of the second part, their successors and assigns forever.

In testimony whereof, the said parties of the first part,
86 have hereunto set their hands and affixed their seals, the day and year first above written.

JAS. H. McKEE. [SEAL.]
MARY McKEE. [SEAL.]
JAS. THOMAS. [SEAL.]
MARY A. THOMAS. [SEAL.]
J. W. FULLER, JR. [SEAL.]
KATE M. FULLER. [SEAL.]
W. R. THOMAS. [SEAL.]
MARTHA THOMAS. [SEAL.]
JOS. J. McKEE. [SEAL.]

Signed, sealed, and delivered in the presence of—
SAMUEL B. HUEY.
JOSEPH JAMES.
JOSEPH JAMES.
SAM. B. HUEY.
J. T. HARRIS.

Witness- to Martha Thomas—
J. B. MOORE &
JOSEPH JAMES.

STATE OF PENNSYLVANIA, }
City & County of Philadelphia. }

I, S-muel B. Huey, commissioner of the State of Alabama to take and certify depositions, to receive acknowledgements, and take the proof of the conveyance of property lying in the State of Alabama, duly appointed and commissioned by the governor of the State of Alabama for the State of Pennsylvania, and resident in the city of Philadelphia, hereby certify that James H. McKee and Mary McKee, his wife, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and seal of office this 15th day of Sept., 1874.

SAMUEL B. HUEY,
A Commissioner of Ala. in Penn.

STATE OF PENNSYLVANIA, }
City & County of Philadelphia. }

87 I, Samuel B. Huey, commissioner of the State of Alabama to take and certify depositions, to receive acknowledgements, and take the proof of conveyances of property lying in the State of Alabama, duly appointed and commissioned by the governor of the State of Alabama for the State of Pennsylvania, and resident in the city of Philadelphia, hereby certify that J. W. Fuller, Jr., and Kate

M. Fuller, his wife, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and seal of office this 10th day of November, A. D. 1873.

SAMUEL B. HUEY,
A Commissioner for Alabama in Pennsylvania.

Filed for record in my office on the 20th day of November, 1874, and on the 21st day of the same month and year was duly recorded in Deed Book, volume 21, pages 545, 546.

JOHN C. MORROW,
Judge of Probate.

Endorsed on the foregoing exhibit is the following: McKee, Fuller & Co. to Jefferson Iron Company.

EXHIBIT G.

Jefferson Iron Company
to
D. B. Miller.

Know all men by these presents that the Jefferson Iron Company, a corporation organized under the laws of Alabama, in consideration of the sum of forty thousand dollars duly paid by D. B. Miller, of the city of Cincinnati, county of Hamilton and State of Ohio, the receipt of which is hereby acknowledged, hereby grant, bargain, sell, and convey to the said D. B. Miller, his heirs and assigns forever, the following-described tracts and parcels of land, situate, lying, and being in the counties of Jefferson and Shelby, in the State of Alabama, viz: The W. ½ of the N. W. ¼ and the N. E. ¼ of the N. W. ¼ of section 2, township 18,
88 range 2 west, containing one hundred and twenty acres, more or less; also the N. W. ¼ of the N. E. ¼, the E. ½ of the N. E. ¼, the N. E. ¼ of the S. E. ¼, the W. ½ of the S. E. ¼, and the N. E. ¼ of the N. W. ¼ of section 3, township 18, range 2 west, containing two hundred and eighty acres, more or less; also the N. E. ¼ of the N. E. ¼ of section 4, township 18, range 2 west, containing forty acres, more or less; also the S. E. ¼ of the N. W. ¼, the S. W. ¼ of the N. W. ¼, the S. W. ¼ of the N. E. ¼, the N. W. ¼ of the S. W. ¼, and the N. E. ¼ of the S. W. ¼ of section 11, township 18, range 2 west, containing two hundred acres, more or less; also the S. E. ¼ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of section 26, township 18, range 2 west, containing eighty acres, more or less; also the S. E. ¼ of the N. E. ¼, the E. ½ of the S. E. ¼, and the N. W. ¼ of the S. E. ¼ of section 35, township 18, range 2 west, containing one hundred and sixty acres, more or less; also that part of the S. W. ¼ of the S. E. ¼ of section 1, township 18, range 2 west, described as follows, viz: Commencing at the S. E. corner of said quarter,

thence running west on the section line ten chains, more or less, to a small creek near where it empties into the Cahaba river; thence running north 5 W. thirteen chains, more or less, to the north line of said quarter; thence E. twelve chains, more or less, to the N. E. corner of said quarter; thence south thirteen chains, more or less, to the place of beginning, containing thirty-one acres, more or less; also that part of the N. W. ¼ of the N. E. ¼ of section 12, township 18, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence running south ten chains, more or less, to the opposite bank of the Cahaba river; thence following down the said river to the half-section line between the east and west halves of section 12; thence north to the section line between sections one and twelve; thence east
89 to the place of beginning, containing fifteen acres, more or less, together with all rights and privileges conveyed *to* Wallace G. McElwain to A. D. Breed for mining minerals, making roads cutting and using timber, making the Cahaba river navigable by slack-water or other means on or through his land, or for other purposes, as will more fully appear in the deed of said Pool to said McElwain, bearing date November 2d, 1863, and recorded in Record of Deeds, volume 14, page 120, of the record- of said Jefferson county, Alabama, to which reference is made; also the E. ½ of N. E. ¼, the S. W. ¼ of the N. E. ¼, and the S. E. ¼ of section 34, township 17, range 2 west, containing two hundred and eighty acres, more or less; also that part of the N. E. ¼ of the S. W. ¼ of section 34, township 17, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence south to the Montevallo & Trussville road, thence along said road to the south line of said quarter, thence west on said south line to the S. W. corner of said quarter, thence north to the N. W. corner, thence east to the place of the beginning, containing thirty-five acres, more or less; also that part of the S. E. ¼ of the S. E. ¼ of section 27, township 17, range 2 west, described as follows, viz: Commencing at the N. W. corner of said quarter, thence running south to the section line, thence east to the S. E. corner of said section 27, thence up the spring branch to the spring, thence in a straight line to the place of beginning, containing twenty acres, more or less; also that part of the S. E. ¼ of the N. W. ¼ of section 27, township 17, range 2 west, described as follows, viz: Commencing at the S. E. corner of said quarter, thence in a N. W. direction to a mountain-oak tree on the top of the ridge in the gap of the Red mountain, thence in a S. W. direction about six hundred feet to a post-oak tree, thence at a right angle to the line between the mountain oak and the post oak in a S. E. direction to the south
90 line of the said S. E. ¼, thence east on said south line to the place of beginning, containing ten acres, more or less; also that part of the S. E. ¼ of the S. E. ¼ of section 28, township 18, so described in said McElwain's deed to said A. D. Breed, but probably lies in township 17 instead of 18, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence south to the S. E. corner of the same, thence west to the S. W. corner of

the same, thence north to the top of the Red mountain, thence along the top of said Red mountain in a N. E. direction to the north line of said quarter, thence east on said line to the place of beginning, containing thirty acres, more or less; also the right of way for a railroad from Irondale to the South & North railroad through the S. E. ¼ of S. E. ¼ of section 12, township 18, range 3 west, conveyed to A. D. Breed by Henry K. Byers and wife — bearing date January 2d, 1867, and recorded in Book 14, pages 467 to 468, of the said Jefferson county record-; also the east ½ of the S. E. ¼ of section 5, township 18, range 2 west, all the foregoing-described property being the same property conveyed to the Jefferson Iron Company by A. D. Breed by deed dated Oct. 22d, 1873, and recorded in Deed Book, volume 19, pages 164, '5, '6, '7, of Jefferson county records; also the following tracts of land, viz: One hundred sixty acres of timbered land known and described at the General Land Office as the N. E. ¼ of section 7, township 18, range 2 west; also forty acres of iron land on the Red mountain near the above and known and described as the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, these two tracts last mentioned lying and being in said Jefferson county, Alabama, and containing in all about two hundred acres, be the same more or less; also the following tracts of land, viz: The N. W. ¼ of section 5, township 18, of range 2 west; also the N. E. ¼ of the S. W. ¼ and ten acres square in the N. W. corner of
91 the S. E. ¼ of the S. W. ¼ of section 6, township 18, range 2 west, lying in Jefferson county, about two and one-half miles southeast of Elyton, on Red mountain, containing two hundred and ten acres, more or less; also the following-described property: The east ½ of the N. E. ¼, the S. W. ¼ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the E. ½ of the S. W. ¼ of section 27, township 17, range 2 west, containing two hundred and forty acres, more or less; also the following-described property, viz: All the coal commonly known as bituminous coal and all other kind of coal and all minerals of whatsoever name or kind that lie deposited on or below the surface of the following-described tracts of land, viz: The S. W. ¼ of the S. E. ¼ of section 26, township 16, of range 3 west, and the N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section 35 and the S. E. ¼ of the S. W. ¼ of section 26, township 16, range 3 west, containing about one hundred and sixty acres; also the E. ½ of the S. W. ¼ of the section 27, township 16, of range 3 west; also the W. ½ of the S. W. ¼ of section 26, in the same township and range, with the right to mine the same, the right to use all necessary timber and water, and to erect all necessary buildings that may be needed for such mining purposes, the right of way over said lands for all necessary roads, and all other rights and privileges that may be found necessary in the proper mining and transportation of said coals or other minerals and every part and parcel thereof; to have and to hold the same, together with the buildings, furnaces, fixtures, improvements, appurtenances, and hereditaments thereunto belonging or in anywise appertaining, with all the privileges and all the rents, issues, and profits there-, unto the said D. B. Miller, his heirs and assigns forever; provided, nevertheless, that his mortgage is given to se-

cure the payment of eight certain promis-ory notes, of even
92 date herewith, for five thousand dollars each, executed by the Jefferson Iron Company to the order of D. B. Miller, as follows, viz: One note payable one year from date with eight per centum interest; one note payable thirteen months from date with eight per cent. interest from Dec. 9th, 1874; one *month* payable fourteen months from date with eight per cent. interest from January 9th, 1875; one note payable fifteen months from date with eight per cent. interest from February 9th, 1875; one note payable sixteen months from date with eight per cent. interest from March 9th, 1875; one note payable seventeen months from date with eight per cent. interest from *date from* April 9th, 1875; one note payable eighteen months from date with eight per cent. interest from May 9th, 1875; one note payable nineteen months from date with eight per cent. interest from June 9th, 1875.

Now, therefore, if the said Jefferson Iron Company, its successors or assigns, shall pay or cause to be paid to the said D. B. Miller, his heirs or assigns, according to the tenor thereof, these said eight promissory notes, then these presents shall be utterly null and void; otherwise they shall remain in full force and effect.

In witness whereof the said Jefferson Iron Company, by James H. McKee, its president, and by J. W. Fuller, its secretary, duly authorized for this purpose by vote of the board of directors, have hereunto set its hand and its corporate seal, at the office of the said company, this 9th day of November, in the year of our Lord one thousand eight hundred and seventy-four.

JEFFERSON IRON COMPANY,
Per JAMES H. McKEE, *President.*
J. W. FULLER, *Tres. & Sec'ty.*

Signed, sealed, and acknowledged in presence of us:
W. H. GLACE.
AUG. H. GILBERT.

STATE OF PENNSYLVANIA,
City & County of Philadelphia.

93 Be it remembered that on the 10th day of November, A. D. 1874, before me, Samuel B. Huey, a commissioner for the State of Alabama, resident in the city, county, and State aforesaid, personally appeared James H. McKee, president of the Jefferson Iron Company, who, being duly sworn, deposes and says that he was personally present at the execution of the within indenture and saw the common seal of the said company duly affixed thereto; that the seal so affixed is the common and corporate seal of the Jefferson Iron Company, and that the within indenture was duly signed, sealed, and delivered *by us* and for the act and deed of the said company — in attestation of the due execution and delivery of the said indenture is of the deponent's own proper handwriting.

JAMES H. McKEE.

Sworn to and subscribed before me at Philadelphia aforesaid.

SAMUEL B. HUEY,
A Commissioner for Alabama in Pennsylvania.

Filed for record in my office on the 22d day of November, 1874, and on the same day, month, and year duly recorded in my office in Deed Book, volume 21, pages 539, 540, '1, '2, '3.

JOHN C. MORROW,
Judge of Probate.

Endorsed on the foregoing exhibit is following: At a sale of the property herein described, at the court-house of Jefferson county, between the legal hours of sale, on this the 11th day of May, 1880, D. B. Miller, the mortgagee, became the purchaser at and for the sum of five thousand dollars, and the same was bidden off to him at that price. D. B. Miller, mortgagee, and Abel D. Breed, assignee. May 11th, 1880.

EXHIBIT H.

COMMONWEALTH OF PENNSYLVANIA, }
County of Philadelphia. }

94 Know all men by these presents that whereas on the 9th day of November, A. D. 1874, the undersigned, Jefferson Iron Company, a body corporate, by its president, James H. McKee, who was thereunto duly authorized, executed and delivered to D. B. Miller, of Cincinnati, Ohio, a mortgage to secure the payment of notes therein named upon the following-described lands, to wit: All the following-described tracts and parcels of lands, situate, lying, and being in the counties of Jefferson and Shelby, in the State of Alabama, viz: The W. ½ of the N. W. ¼ and the N. E. ¼ of the N. W. ¼ of section 2, township 18, range 2 west, containing one hundred and twenty acres, more or less; also the N. W. ¼ of the N. E. ¼, the E. ½ of the N. E. ¼, the N. E. ¼ of the S. E. ¼, the W. ½ of the S. E. ¼, and the N. E. ¼ of the N. W. ¼ of section 3, township 18, range 2 west, containing two hundred and eighty acres, more or less; also the N. E. ¼ of the N. E. ¼ of section 5, township 18, range 2 west, containing forty acres, more or less; also the S. E. ¼ of the N. W. ¼, the S. W. ¼ of the N. W. ¼, the S. W. ¼ of the N. E. ¼, the N. W. ¼ of the S. W. ¼, and the N. E. ¼ of the S. W. ¼ of section 11, township 18, range 2 west, containing two hundred acres, more or less; also the S. E. ¼ of the S. W. ¼ and S. W. ¼ of S. E. ¼ of section 26, township 18, range 2 west; also the S. E ¼ of the N. E. ¼, the E. ½ of the S. E. ¼, and the N. W. ¼ of the S. E. ¼ of section 34, township 18, range 2 west, containing one hundred and sixty acres, more or less; also that part of the S. W. ¼ of the S. E. ¼ of section 1, township 18, range 2 west, described as follows, viz: Com-encing at the S. E. corner of said quarter, thence running west on the section line ten chains, more or less, to a small creek near where it empties into the Cahaba river; thence running north 5° west thirteen chains, more or less, to the north side or line of said quarter; thence east twelve

chains, more or less, to the N. E. corner of said quarter; thence south thirteen chains, more or less, to the place of beginning,
95 containing —, more or less; also that part of the N. W. ¼ of the N. E. ¼ of section 12, township 18, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence running south ten chains, more or less, to the opposite bank of the Cahaba river; thence following down the said river to the half-section line between the east and west halves of section 12; thence north to the section line between the sections 1 and 12; thence east to the place of beginning, containing fifteen acres, more or less, together with all rights and privileges conveyed to Wallace S. McElwain by S. Poole and conveyed by said McElwain to A. D. Breed for mining minerals, making roads, cutting and using timber, making the Cahaba river navigable by slack-water or other means on or through his land, or for other purposes, as will more fully and at large appear in deed of said Pool to said McElwaine, bearing date Nov. 2d, 1873, and recorded in Record of Deed Book, volume 14, page 120, of the records of said Jefferson county, Ala., to which reference is made.

Also the E. ½ of N. E. ¼, the S. W. ¼ of N. E. ¼, and the S. E. ¼ of section 34, township 17, range 2 west, containing two hundred and eighty acres, more or less; also that part of the N. E. ¼ of the S. W. ¼ of section 34, township 17, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence south to the Montevallo and Trussville road, thence along said road to the south line of said quarter, thence west on said south line to the S. W. corner of said quarter, thence north to the N. W. corner, thence east to the place of beginning, containing thirty five acres, more or less; also that part of S. E. ¼ of the S. E. ¼ of section 27, township 17, range 2 west, described as follows, viz: Commencing at the N. W. corner of said quarter, thence running south to the section line, thence east to the S. E. corner of said section 27, thence up the spring branch to the spring, thence in a straight line to the place of
96 beginning, containing twenty acres, more or less; also that part of S. E. ¼ of the N. W. ¼ of section 27, township 17, range 2 west, described as follows, viz: Commencing at the S. E. corner of said quarter, thence in a N. W. direction to a mountain-oak tree on the top of the ridge in the gap of Red mountain, thence in a S. W. direction about six hundred feet to a post-oak tree, thence at a right angle to the line between the mountain oak and post oak in a S. E. direction to the south line of the said S. E. ¼, thence east on said south line to the place of beginning, containing ten acres, more or less; also that part of the S. E. ¼ of the S. E. ¼ of section 28, township 18, so described in said McElwaine's deed to said A. D. Breed, but probably lies in township 17 instead of 18, range 2 west, described as follows, viz: Commencing at the N. E. corner of said quarter, thence south to the S. E. corner of the same, thence west to the S. W. corner of the same, thence north to the top of Red mountain, thence along the top of said Red mountain in a N. E. direction to the north line of said quarter, thence east on said line to the place of beginning, containing thirty acres, more or less; also the right

of way for a railroad from Irondale to the South & North railroad through the S. E. ¼ of the S. E. ¼ of section 12, township 18, range 3 west, conveyed to A. D. Breed by Henry K. Byers and wife by deed bearing date January 2d, 1867, and recorded in Book 14, pages 467, '8, of the said Jefferson county records; also the E. ½ of the S. E. ¼ of section 5, township 18, range 2 west, and the N. E. ¼ of the N. E. ¼ of section 8, township 18, range 2 west, all of the foregoing-described property being the same conveyed to the Jefferson Iron Company by A. D. Breed by deed bearing date October 22d, 1873, and recorded in Deed Book, volume 19, pages 164, '5, '6, '7, of Jefferson county records.

Also the following tracts of land, viz: One hundred and sixty acres of timber land known and described at the General
97 Land Office as the N. E. ¼ of section 7, township 18, range 2 west; also forty acres of iron land *and* on the Red mountain near the above and known and described as the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, these two tracts last mentioned lying and being in said Jefferson county, Alabama, and containing in all about two hundred acres, be the same more or less; also the following tracts of land, viz: The N. W. ¼ of section 5, in township 18, range 2 west; also the N. E. ¼ of the S. W. ¼ and ten acres square in the northwest corner of the S. E. ¼ of the S. W. ¼ of section 6, township 18, range 2 west, lying in Jefferson county, about two and one-half miles southeast of Elyton, on Red mountain, containing two hundred and ten acres, more or less; also the following-described property: The E. ½ of the N. E. ¼, the S. W. ¼ of N. E. ¼, the N. W. ¼ of S. E. ¼, the E. ½ of the S. W. ¼ of section 27, township 17, range 2 west, containing two hundred and forty acres, more or less; also the following-described property, viz: All the coal commonly known as bituminous coal and all other kinds of coal and minerals, of whatever name or kind, that lie deposited on or below the surface of the following-described tracts of land, viz: The S. W. ¼ of S. E. ¼ of section 26, township 16, range 3 west, and the N. E. ¼ of the N. W. ¼ and the N. W. ¼ of the N. E. ¼ of section 35 and the S. E. ¼ of S. W. ¼ of section 26, township 16, range 3 west, containing about one hundred and sixty acres; also the S. W. ¼ of the N. E. ¼ and the S. E. ¼ of the N. W. ¼; also the E. ½ of the S. W. ¼ of section 27, township 16, of range 3 west; also the W. ½ of the S. W. ¼ of section 26, in the same township and range, with the right to mine the same, the right to use all necessary timber and water, and to erect all necessary buildings that may be needed for such mining purposes, the right of way over said lands for all necessary roads and all other rights and privileges that may be found necessary in the proper mining and transportation of said
98 coal or other minerals and every part and parcel thereof; to have and to hold the same, together with the buildings, furnaces, fixtures, improvements, appurtenances, and hereditaments thereunto belonging or in anywise appertaining, with all the privileges and all the rents, issues, and profits thereof, unto the said D. B. Miller, his heirs and assigns forever.

And whereas said D. B. Miller has traded said mortgage and the

notes thereby secured to Abel D. Breed, of Cincinnati, Ohio; and whereas in said mortgage no power of sale is given; and whereas by giving said D. B. Miller a power to sell said real estate the heavy expenses of a chancery suit and sale will be avoided: Now, therefore, in consideration of the premises and one dollar to the undersigned in hand paid by said D. B. Miller, the receipt whereof is hereby acknowledged, the said D. B. Miller is hereby authorized and empowered, after giving thirty days' notice, by publication in the Jefferson Independent, a newspaper published in said Jefferson county, Alabama, — the time, terms, and place of sale, to sell the same, in front of the court-house of said county, for cash, and, after paying the costs of advertising and selling, to pay off said mortgage debt and interest and the surplus, if any, to be turned over to the undersigned.

And the said D. B. Miller is hereby authorized to bid at said sale and, if the highest and best bidder, to become the purchaser of said property, with the express condition that no higher or better title shall pass by said sale than is now held by the Jefferson Iron Company; and the said D. B. Miller is hereby authorized and empowered to make, execute, and deliver, by proper deed, conveyances, or assurances in law to pass title to, said hereinbefore-mentioned real estate to the purchaser thereof at said mortgage sale, or if said D. B. Miller becomes the purchaser, then to make title to himself or through a third party; and it is further agreed that full power is hereby given D. B. Miller to substitute one or more persons under him in carrying out the trust and in or concerning the premises or any part thereof and the same at his pleasure to revoke, hereby ratifying and confirming the proper execution of this trust or that of the substitutes under him shall and may do by virtue hereof in the premises.

99

The said mortgage is recorded in volume No. —, page —, in the said county records, in said State of Alabama.

In witness whereof the said Jefferson Iron Company, by its president, James H. McKee, duly authorized for this purpose by vote of board of directors, hath hereunto set its hand and affixed the corporate seal of said corporation this — day of ——, A. D. 1880.

JEFFERSON IRON CO.,
By its president, JAS. H. McKEE.
J. W. FULLER, *Sec't'y.*

Attest: A. W. ULRICH.
A. F. FULLER.

STATE OF PENNSYLVANIA,
City & County of Philadelphia.

Be it remembered that on the 10th day of March, A. D. 1880, before me, Samuel B. Huey, a commissioner for the State of Alabama, resident in the city, county, and State aforesaid, personally appeared James H. McKee, president of the Jefferson Iron Co., who, being duly sworn, deposes and says that he was personally present at the execution of the foregoing indenture and saw the common

seal of the said Co. duly affixed thereto; that the seal so affixed is the common and corporate seal of the Jefferson Iron Co., and that the *written* indenture was duly signed, sealed, and delivered *by* and for the act and deed of the said company for the uses and
100 purposes therein expressed, and that the name of this deponent subscribed to the said indenture as president of said company in attestation of the due execution and delivery of the said indenture is of the deponent's own proper handwriting.

JAMES H. McKEE.

Sworn to and subscribed before me at Philadelphia the day and year aforesaid.

SAMUEL B. HUEY,
A Commissioner for Alabama in Pennsylvania.

On the foregoing exhibit is the following: Jefferson Iron Company to D. B. Miller, providing for foreclosure.

EXHIBIT I.

The Alabama & Chattanooga Railroad Co.
to
The State of Alabama.

This indenture of mortgage made this 2d day of March, in the year eighteen hundred and seventy, by and between the Ala. & Chatta. R. R. Co., a corporation of the States of Alabama, Georgia, Mississippi and Tennessee, the party of the first part and the State of Alabama, party of the second part, witnesseth: That whereas, said State of Alabama by an act entitled "An act to loan the credit of the State of Alabama to the Alabama & Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama" and approved February 11th, 1870, has granted certain aid to said corporation and has in and by said act required the governor of said State to issue bonds of said State to an amount not exceeding two millions of dollars in favor of said company bearing interest at a rate not exceeding eight per cent. per annum, which said interest shall be payable at the expiration of not less than fifteeen nor more than thirty years, upon the terms and conditions in said act set forth; and whereas, said act further provides
101 that the governor of the said State shall only issue said bonds upon receiving in exchange therefor an equal amount of first-mortgage bonds of said railroad company having the same rate of interest as the above-mentioned State bonds and secured by first mortgage upon the lands granted by the United States to said railroad company and upon any interest which said company now has, or may hereafter lawfully acquire in or to said lands with this reservation, that the said Ala. & Chatta. R. R. Co. shall have the privilege and right of selling said lands, or any part thereof in ac-

cordance with the act of Congress granting the same; provided, however, that the proceeds of said sales shall be appropriated to the payment of the aforesaid first-mortgage bonds of the said railroad company issued to the State; provided further that the governor shall require said railroad company before issuing to said company said bonds to give to the State of Alabama a first mortgage on the telegraph line and telegraph offices, along the line of said road belonging to said company; also, on the machine shops and all other property in the State and in Georgia, Tennessee and Mississippi belonging to said company; also, on all coal mines now open, or hereafter to be opened and worked belonging to said company; also, upon all iron, or other mineral lands and all iron-manufacturing establishments now in operation and hereafter to be constructed; and whereas, said Alabama & Chattanooga Railroad Company in order to obtain said State aid, proposes to issue to said State bonds of said corporation secured as by said act is required and entitled first-mortgage land bonds of the Alabama & Chattanooga Railroad Company.

Now, therefore, the said Alabama & Chattanooga Railroad Company in compliance with the said terms and conditions of said act and for the purpose of obtaining the aid thereby granted to the corporation, and in order to secure the punctual payment
102 of all said first-mortgage land bonds of this corporation, do hereby bargain, grant, sell, enfeoff, release, assign and convey unto the State of Alabama and its successors and assigns forever, all the lands granted by the United States to and for the benefit of this company and all the right title, interest and estate which said company now has, or may hereafter lawfully acquire in or to said lands subject to the reservation to said company as by said act; provided that said company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same and entitled "An act to renew certain grants of land to the State of Alabama" and approved, April, 10th, 1869; provided, however, that the proceeds of said sales shall be appropriated to the payment of the aforesaid first-mortgage land bonds of said company to be issued to the State of Alabama as aforesaid; also, the telegraph line and telegraph offices along the line of said road and belonging to said company; also, the machine shops and all other property in said State- of Alabama, Georgia, Tennessee and Mississippi, belonging to said company; also, all coal mines now open, or hereafter to be opened and worked belonging to said company; and all iron or other mineral lands and all iron-manufacturing establishments now in operation and hereafter to be constructed, saving and excepting only from said granted premises such and so much of the same as said company may have heretofore conveyed in mortgage, in, or by either, or both of two indentures of mortgage, both made on December, 19th, 1868 and covering the railroad and certain other property of said company; for a more specific description whereof, reference is hereby made to said two indentures, the same having been recorded in the counties where said road is located.

To have and to hold the said granted premises mentioned as aforesaid unto the said State of Alabama, its successors and assigns to and for the only use, benefit and behoof of said State, its
103 successors and assigns.

Provided, however, if said company, its successors, or assigns shall well and truly pay, or cause to be paid to the State of Alabama, its successors, or assigns any and all of the above-mentioned first-mortgage land bonds of said company issued to said State as above provided, and coupons, or interest warrants issued with and belonging to the same when and as the same shall respectively fall due, then this deed shall be null and void; otherwise, to remain in full force and effect.

In witness whereof, the said Alabama & Chattanooga Railroad Company has caused its corporate seal to be hereto affixed and these presents to be executed in its behalf by Daniel N. Stanton, its president on the day and year first above mentioned. (In twelve parts.)

ALABAMA & CHATTANOOGA RAILROAD COMPANY,
By DANIEL N. STANTON, *President.*

Executed in presence of—
R. T. PAINE, JR.
JAS. B. BELL.

James B. Bell, notary public and commissioner for all the States and Territories, No. 12 old state-house, head of State street, Boston.

COMMONWEALTH OF MASSACHUSETTS, }
County of Suffolk, City of Boston. }

Be it remembered that on the 14th day of March, in the year of our Lord one thousand eight hundred and seventy, before me, James B. Bell, a commissioner in and for the city of Boston, county of Suffolk, and Commonwealth of Massachusetts, residing in said city, duly commissioned and authorized by the governor and qualified under the laws of the State- of Alabama, Georgia, Mississippi, and Tennessee to take the acknowledgement and proof of the execution of deeds and other instruments in writing under seal or not
104 to be used or recorded in said States of Alabama, Georgia, Mississippi, and Tennessee and to take depositions, administer oaths and affirmations, I hereby certify personally appeared Daniel N. Stanton, president of the Alabama & Chattanooga Railroad Company, whose name as such president is signed to the annexed indenture of mortgage, with whom I am personally acquainted, *that*, being informed of the contents of said indenture of mortgage and being by me duly sworn, deposed and said that he was personally present at the execution of the annexed indenture of mortgage on the day the same bears date and saw the common seal of the said Alabama & Chattanooga Railroad Company duly affixed thereto, and that the seal so affixed is the common and cor-

porate seal of the said Alabama & Chattanooga Railroad Company, and that the annexed indenture of mortgage was duly signed, sealed, and delivered by him, by order of the board of directors of the said Alabama & Chattanooga Railroad Company, as and for the act and deed of the said Alabama & Chattanooga Railroad Company for the uses and purposes therein contained, and his name is subscribed to the said annexed indenture of mortgage as the president of said company in attestation of the due execution and delivery of the said indenture and is of his own proper handwriting.

In witness whereof I have hereunto set my hand and affixed my official seal as commissioner of the States of Alabama, Georgia, Mississippi, and Tennessee, at my office, in the city, county, and Commonwealth aforesaid, in the day and year above written.

JAMES B. BELL,
A Commissioner for the States of Alabama, Georgia, Mississippi, and Tennessee.

I do hereby certify that this mortgage was filed for record in my office on the 11th May, 1870.

JOHN C. MORROW,
Judge of Probate.

105 And this mortgage, being a printed copy of the original, and said original being stamped with a United States internal revenue stamp, was this day duly recorded in Deed Book, vol. 16, pages 143, '4, '5.

May 13th, 1870.

JOHN C. MORROW,
Judge of Probate.

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER, Complainant,
vs.
JOHN SWANN & JOHN A. BILLUPS. } Security for Costs Endorsed on Bill.

The complainant, Dr. D. B. Miller, being a non-resident, I hereby acknowledge myself security for costs in the above cause.

Witness my hand this 20th day of June, 1884.

A. BEERS.

Affidavit of Non-Residence of One of Defendants.

STATE OF ALABAMA, }
Jefferson County. }

Before me, A. O. Lane, register in chancery for the eighth district, western division, of Alabama, personally appeared Henry A. Sharpe, agent and attorney for the complainant in the foregoing bill of complaint, who upon oath states that in his belief the defendant John Swann is a non-resident of the State of Alabama and is over the

age of twenty-one years, and that the age and residence of the defendant Julia B. Berry are both unknown to —.

H. A. SHARPE.

Sworn to and subscribed before me this 15th day of July, 1884.

A. O. LANE, *Register.*

Endorsed on foregoing is the following: Filed in office this the 15th day of July, 1884. A. O. Lane, register.

106 The answer of John Swann and John A. Billups, trustees, to the bill of complaint filed against them and others on the 15th day of July, 1884, in the office of the register of the chancery court of Jefferson county, Alabama, by D. B. Miller.

These defendants, Swann & Billups, trustees, for answer to said bill as well as to the several paragraphs and allegations thereof, say as follows:

The particular parcels of land as to which relief is sought by said bill and which are described in said bill are parts and parcels of the lands granted to the State of Alabama, first by said act of Congress of June 3d, 1856, mentioned in said bill, and afterwards by said act of Congress of April 10th, 1869, also mentioned in said bill. The said particular tracts or parcels of land which complainant alleges to have been sold by the Ala. & Chatta. R. R. Co. to said Joab Bagley were never sold by that company to said Joab Bagley or to any Bagley, nor did that company ever give to said Duffy or to any other person any written authority or authority in writing to sell or convey said particular parcels of land to said Joab Bagley or to any Bagley, nor was any sale of said particular parcels of land ever made to said Joab Bagley or to any Bagley which had any validity against the State of Alabama or its grantees, the said Swann & Billups, trustees, appointed under the act of the legislature of Alabama of February 23d, 1876, and commonly known as the "debt-settlement act." The said particular parcels of land are not only embraced by said act of Congress, but also by said sale to the State of Alabama in said bankruptcy proceeding, and also by said mortgage to the State of Alabama, a copy of which is set forth in Exhibit I to said bill, and are parts and parcels of the lands conveyed by that mortgage to said State. The said mortgage was executed by the said The Alabama & Chattanooga Railroad Company on the day of its date,

March 2d, 1870, to the State of Alabama to secure the payment
107 of the liability or indebtedness therein shown and in consideration of two millions of dollars of the bonds of said State loaned and delivered to said company at the time in pursuance of and under the said act of the legislature of Alabama of February 11th, 1870, mentioned in said bill. The said mortgage was duly deposited for record and duly recorded in the office of probate judge of Jefferson county, Alabama, within less than ninety days or within less than three months from the time and date of its execution, to wit, on the — days of May, 1870, as more fully and truly appears in the

said Exhibit I to the said original bill and in the certificates and entries appearing in said Exhibit I attached to said bill. The due recording of said mortgage was in the office of the probate judge of Jefferson county, Alabama, the county in which said particular parcels of land were and are situated, as well as in other counties of Alabama. The said particular parcels of land were within six miles of the line and location of the Alabama & Chattanooga railroad as said line and railroad was located in October or November or December, 1858, and said railroad so located was completed in or about May, 1871, and the said particular parcels of land were also within six miles of the South & North Alabama railroad as that railroad was located and completed, this last-mentioned railroad having been located in 1858, and some few days after the Alabama & Chattanooga railroad had been located, and having been completed in or about October, 1872, some months after the Alabama & Chattanooga railroad had been completed.

The indebtedness or liability to secure which said mortgage was executed to the State of Alabama was evidenced by two millions of dollars of the bonds of the said The Alabama & Chattanooga Railroad Company, payable to said State, with interest payable semi-annually, as more fully and at large appears by said mortgage; has never
108 been paid, satisfied, or discharged, but remains unpaid and of full force except only the first instalment of semi-annual interest which fell due thereon; said unpaid indebtedness and liability and said mortgage unsatisfied and unpaid were together transferred by said State to the said trustees, John Swann and John A. Billups, under and pursuant to the said debt-settlement act of the legislature of Alabama, which act was approved February 23d, 1876. The said State of Alabama never transferred nor authorized the transfer of said mortgage or the indebtedness or liability thereby secured nor any part of said particular parcels of land to any other persons than to said trustees, said Swann & Billups above mentioned, nor did said State of Alabama ever authorize or permit or sanction any sale of any part of said particular parcels of land described in said bill by said Duffy or by any other person who, like said Duffy, claimed to be authorized as the agent of the Alabama & Chattanooga Railroad Company to sell said particular parcels of land, but who, in fact, like said Duffy, never had any authority in writing to sell any part of said particular parcels of land. The said Duffy never did have any authority in writing from the Alabama & Chattanooga Railroad Company to sell any part of said particular parcels of land, and any sale thereof made by him was void by the statute of Alabama, which requires the agency or authority of one person to sell the lands of another to be in writing, and which statute is here pleaded as to any sale alleged to have been made by said Duffy. These defendants, said Swann and Billups, trustees as aforesaid, deny that the Alabama & Chattanooga Railroad Company at any time after the aforesaid execution and recording of its said mortgage of March 2d, 1870, to the State of Alabama had power or authority by an agent without any authority in writing to sell any part of said parcels of land to any

Bagley. They also deny that said last-mentioned company
109 ever did sell or agree to sell to any Bagley or to any other person any part of said particular parcels of land.

These defendants also deny that said Duffy ever had any authority in writing from the Alabama & Chattanooga Railroad Company to sell any part of said particular parcels of land. They also deny that said Duffy was ever the "duly authorized agent" of said last-mentioned company for the sale of any part of said particular parcels of land alleged in said bill to have been sold to said Joab Bagley.

On the petition and at the suit of W. A. C. Jones, then a creditor of the Alabama & Chattanooga Railroad Company, and not on the petition nor at the suit of the State of Alabama filed in the district court of the United States for the middle district of Alabama, sitting as court of bankruptcy, in September, 1871, to wit, on the 15th day of Sept., 1871, the Alabama & Chattanooga Railroad Company was duly declared and decreed a bankrupt on the — day of November, 1871, and that decree adjudging that company a bankrupt remains of full force and has never been set aside or reserved. The said proceeding in bankruptcy begun by that petition of said W. A. C. Jones has never yet been finally terminated, but is still pending, and there continues yet to be an assignee in bankruptcy of said bankrupt corporation duly appointed in that proceeding more than four years before the filing of said bill in the present case. It was in the course of said proceeding in bankruptcy and after due appointment therein of one or more assignees in bankruptcy of said bankrupt and after such assignee or assignees had become duly vested with and the transferrees of all the estate of said bankrupt and as long ago as 1872, 1873, and before July, 1874, and more than ten years before the filing of the bill in this suit, that all the lands as to which any relief is sought in the present suit, either in behalf of complainant or of said Ellis Phelan, were sold, as mentioned in said bill of complainant, by decree of
110 said United States court and purchased at that sale by the State of Alabama, and all of said lands ever since that sale have been held by the State of Alabama and those claiming and holding under and by direct act of State done or enacted since that sale. If said Duffy ever was the agent of the Alabama & Chattanooga Railroad Company for any purpose, he certainly never has been agent of that company for any purpose since that company was adjudged a bankrupt as aforesaid. The said sale under the decree of said court of bankruptcy at which the State of Alabama became the purchaser as aforesaid was at the instance and on the petition of one or more of the assignees in bankruptcy duly appointed in said bankruptcy proceeding. Said petition was duly filed in said court of bankruptcy more than ten years before the filing of the bill in the present suit.

The possession of any part of the lands to which any relief is sought in the present suit, alleged in the said bill of complaint to have been taken or held by said Joab Bagley or by any other Bagley or by those who are alleged in said bill to derive a claim from any Bagley, is denied in any and every form and to every extent in

which it is alleged in said bill. The said Joab Bagley never took or held or had possession of any part of said lands particularly described in said bill, as alleged in said bill, nor did said Ellis Phelan or any of the other alleged claimants under said Joab or Jacob Bagley take and hold possession of any part of said last-mentioned lands, as alleged in said bill. Each allegation of said bill as to any such possession is untrue. The purchase-money which is alleged in said bill to have been agreed to be paid by said Joab or Jacob Bagley for the lands as to which relief is sought by said bill has never been paid, and every allegation of such payment contained in said bill is untrue; and the alleged deed or conveyance to said Ellis Phelan, if ever made, was made at a time when the land
111 therein described was in the adverse possession of another who did not hold or pretend to hold under the alleged grantor of said Ellis Phelan, but adversely and in hostility to that grantor.

The complainant is not a *bona fide* purchaser for value of any part of the lands as to which relief is sought in his said bill without notice of the rights of the State of Alabama in and to said lands, nor is the said Ellis Phelan a *bona fide* purchaser of any part of said lands for value without notice of the rights of the said State therein and thereto, as well as the rights of said trustees, Swann & Billups, therein and thereto.

These defendants deny the allegation of said bill that the said lands or any of the said lands mentioned in said bill were by the State of Alabama assigned and set apart to the said Alabama & Chattanooga Railroad Company after the said act of Congress of April 10th, 1869, was passed.

A correct copy of the deed or conveyance executed on the 8th day of February, 1877, under the said debt settlement-act of February 23d, 1876, by the State of Alabama by its then governor, George S. Houston, to the said John Swann and John A. Billups, trustees, is herewith produced and filed and attached to this answer as part hereof, as called for by said bill, and is marked Exhibit 20. The said Swann and Billups accepted said conveyance absolutely and without any condition other than such as may appear on the face of said conveyance. These defendants deny the allegation of said bill as to any and all other conditions; and they also deny every allegation of the bill which may tend to show any other meaning of said conveyance or of said debt-settlement act than appears on the face of said conveyance or of said debt-settlement act respectively. The said conveyance was duly recorded in the office of the probate judge of Jefferson county, Alabama, within a year from its execution. The payment by John
112 Swann of said forty thousand dollars mentioned in the 20th paragraph of said bill was merely in compromise and settlement of the ten per cent. of the net proceeds of lands sold or to be sold by said trustees which the State of Alabama claimed to be entitled to under section 19 of the said debt-settlement act, and did not and could not operate to impair any right of said trustees or to create or strengthen any right in favor of complainant or said Joab Bagley or of any said persons claiming under or

from said Bagley. These defendants deny the allegations contained in paragraph 22 of said bill, and they also deny that said Joab Bagley ever bought any of the said lands specially described in said bill as having been sold to him from the Alabama & Chattanooga Railroad Company. These defendants also deny that said Bagley ever bought in good faith from said last above mentioned corporation (the Alabama & Chattanooga Railroad Company) any of said last above mentioned lands or any other lands embraced by said mortgage to the State of Alabama of March 2d, 1870. They also deny that said Joab Bagley ever bought from said above-mentioned corporation any of said last above mentioned lands or that he ever paid to said corporation or to any other person the purchase-money agreed to be paid therefor.

It is true, as alleged in paragraph 23 of said bill, that these defendants have uniformly refused to recognize the alleged right of the said Joab Bagley and *of* uniformly denied the existence of any such rights, and here and now again deny that any such rights as alleged in said bill ever did exist in said Joab Bagley or in complainant; and these defendants state that the State of Alabama, as well as these defendants, became a *bona fide* purchaser for value of the lands as to which relief is sought by said bill and paid the full consideration and price therefor without any notice at or before the time of said purchases of said alleged rights of said Joab
113 Bagley or of complainant, but with notice that the Alabama & Chattanooga Railroad Company had never given to said Duffy any authority in writing to sell any of the lands in controversy in this suit.

The allegations contained in paragraph 24 of said bill are true if amended so as to show that in said action of ejectment therein mentioned the declaration contains two counts, one upon the demise of said Swann & Billups, trustees. The said action of ejectment would have been commenced before October, 1883, if these defendants could have found the said Phelan in possession of the lands sued for in that action, but the said Phelan was not in possession of said last-mentioned land until some few weeks or months before October 19th, 1883. Said last-mentioned land was not in possession of complainant or of any person claiming under complainant on the 16th day of July, 1883, or at the time complainant and wife made deed of conveyance therefor to said Phelan, but at the time as well as before said deed to said Phelan was made the said land therein mentioned—that is, the land sued for in said action of ejectment against said Phelan—was in possession of a person who held it adversely and in hostility to the complainant and did not recognize the title or claim of complainant thereto.

These defendants deny the allegation contained in the 30th paragraph of said bill that said Swann and Billups knew of the rights of said Joab Bagley and of orator before they derived their title from the State of Alabama. These defendants also deny each allegation contained in paragraph 30 of said bill.

As to paragraphs 25, 26, 27, 28, and 29 these defendants deny the

allegation contained in each of these paragraphs (25 to 29, inclusive) to the effect that the rights of any defendant in this suit except said Ellis Phelan *is* inferior to the rights of complainant as to any of the lands concerning which relief is sought by said bill. On the
114 contrary, these defendants aver that except said Phelan there is not a defendant whose rights as to any of said last-mentioned lands are inferior to the rights of complainant. The said Phelan having accepted the deed made to him on the 16th July, 1883, by complainant and his wife, as alleged in paragraph 14 of said bill, and having claimed under that deed, his rights as to the lands mentioned in that deed are, of course, inferior to the rights of complainant; but, nevertheless, the said Phelan as to the lands about which relief is sought in this suit, like the complainant, has no rights as against said Swann & Billups nor as against any defendant in this suit. John N. Jenkins, Julia B. Berry, and W. J. Van Kirk respectively assert a claim, as alleged in paragraphs 25, 26, and 27 respectively of said bill, and these claims are superior to any claim of complainant. Said E. A. Taylor claims only under said Jenkins, and said Winsted was only a lessee under said Swann and Billups.

The several acts of Congress and of the legislature of Alabama referred to or mentioned in said bill are hereby accepted as and made part of this answer. These defendants deny every allegation in said bill which is inconsistent with any denial, averment, or statement contained in this answer or with the superior legal and equitable rights of these defendants to each and every part of the lands as to which relief is sought by said bill; and now, having fully answered said bill, these defendants demur to said bill and specify and set down the following grounds or causes of demurrer, to wit: 1. Said bill fails to show any right to any relief on the part of complainant. 2. Said bill shows that as against complainant, as well as against said Ellis Phelan, the defendants Swann and Billups have the superior right and equity as to every part of the
115 lands as to which relief is sought by complainant. 3. Said bill shows that if complainant is entitled to the aid of any court he has a plain, adequate, and complete remedy at law. 4. Said bill shows that complainant is barred by the statute of limitations of Alabama. 5. Said bill shows that complainant is barred by section 5057 of the Revised Statutes of the United States. 6. Said bill shows that complainant is barred by complainant's laches. 7. Said bill shows that complainant's claim is stale and wanting in conscience, good faith, and reasonable diligence.

Wherefore these defendants pray that said bill be dismissed.

SAM. E. RICE,
Sol. for said Swann & Billups.

EXHIBIT 20.

STATE OF ALABAMA,
Montgomery County.

Know all men by these presents that the State of Alabama, in pursuance of the act of the General Assembly to ratify and confirm the settlement of the existing indebtedness of this State as proposed in the report of the commissioners appointed under the act approved 17th day of December, 1874, and which was communicated to the General Assembly by the message of the governor of 24th January, 1876, and to carry said settlement into effect by the issuance of new bonds of this State at a reduced rate of interest in adjustment of a portion of said indebtedness and the surrender of certain securities held by the State in discharge of another portion of said indebtedness, approved February 23d, 1876, and in consideration of the full and perfect performance of all the conditions and requirements contained in the said act by the holders of the bonds hereinafter mentioned, doth hereby assign,
116 transfer, convey, remise, release, and forever quitclaim unto John A. Billups, of the county of Pickens and State aforesaid, the trustee appointed by the governor of this State under the authority of the said act, and unto John Swann, of five Frederick's place, Old Jewry, London, the trustee appointed by the bondholders by virtue of the authority granted by said act, and their successors, all the bonds issued by the Alabama & Chattanooga Railroad Company to the governor of this State in exchange for the bonds of the State of Alabama issued under the authority of the act to loan the credit of the State of Alabama to the Alabama & Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama, approved February 11th, 1870; the deed of mortgage executed by said Alabama & Chattanooga Railroad Company to the State of Alabama, dated second of March, 1870, to secure the payment of said bonds so issued by said railroad company as required by said act of 11th of February, 1870; all the right, title, and interest which this State has or is entitled to in the lands and property described in said deed of mortgage last named executed by said railroad company; all the right, title, estate, and interest acquired by said State in the lands and property mentioned and described in said mortgage at the purchase under the decree of the district court of the United States for the middle district of Alabama in the matter of bankruptcy of the Alabama & Chattanooga Railroad Company; all the right, title, and interest which this State has in and upon or to the telegraph lines and telegraph offices and instruments and on the machine shops and machinery and all coal mines and iron and mineral lands and iron and manufacturing establishments or all or any other property in said statute of February 11th, 1870, referred to by operation of said statute or by any deed or conveyance or contract made by said railroad company for

the indemnity and protection of this State; all money yet unpaid by purchasers of any parts, portions, or parcels of
117 said lands embraced in said mortgage to this State by said railroad company and which have been sold by said railroad company under the authority reserved to it in said act of the 11th of February, 1870; any and all sums of money and securities remaining in the hands or possession of any person or persons, corporation or corporations, the proceeds of any lands, parts of said mortgage property, which may have been sold under the authority reserved as aforesaid and which have not been accounted for and paid into the treasury of this State, as required by said act of the 11th of February, 1870; all the right, title, and interest which this State has in or to any part of the land embraced within the conflicting or overlapping limits of lands granted by the acts of Congress for the benefits of railroads in this State and which on partition heretofore made or hereafter to be made by agreement or otherwise shall be assigned or conveyed to said Alabama & Chattanooga Railroad Company or its assignees as the part belonging to said railroad company under said grants by Congress and is or may be embraced in any conveyance to this State by said railroad company or covered by any lien held by this State by any statute or by any contract or agreement made by said railroad company for the benefit of this State, but nothing herein contained shall convey or give any right to said trustees or the holders of said bonds in any lands held by this State under said acts of Congress as trustee for the construction of any railroad the beneficial interest wherein is not held by this State; all right of this State upon or against said railroad company for the creation and preservation of a sinking fund and the payment into the treasury of the proceeds thereof, subject, however, to the conditions contained in the sixteenth section of the act approved February 23d, 1876, by authority of which this conveyance is made; to have and to hold all the said property and all right, title, and interest in the
118 said property hereby assigned, transferred, and conveyed unto the said John A. Billups and the said John Swann, as trustees as aforesaid, and their successors forever upon trust and confidence; nevertheless that the said trustees shall receive and apply said property and rights for the use and benefit of the holders of the said bonds mentioned in the fifteenth section of the said act approved February 23d, 1876, who may accept the said act in relation thereto and surrender their bonds as therein provided; said trustees shall proceed and collect all the choses in action hereby assigned and transferred and shall proceed and sell all the other property hereby conveyed under authority of said act, and after paying into the treasury of this State ten per cent. of the net proceeds of the sales of all said lands so made by them, having first deducted the reasonable expenses incurred in executing the trust thereof till the whole amount of interest heretofore paid by this State upon said bonds described in the fifteenth section of said act shall be reimbursed to the State, shall distribute the proceeds of all collections and sales so made by them among the holders of said

bonds in proportion to their respective interest therein; said trustees shall have power to sue for and recover for the purposes aforesaid all choses in action and claims and demands of all kinds herein conveyed, and to sue for and recover all lots and parcels of land, part of the lands hereby conveyed, which have been obtained and are now held under fraudulent and fictitious sales and conveyances, and for this purpose, if need be, may use the name of the State, but always at their own cost and charge, but when sales of said lands or any portion thereof have heretofore been made to purchasers in good faith under the authority reserved to said railroad company by the said act approved February 11th, 1870, said trustees shall make title thereto where not already made, but shall collect the purchase-money therefor when not already paid, and all sums part of said purchase-money remaining unpaid, and be entitled to all the
119 securities for the payment thereof; said sales of land may be made from time to time as may be found expedient and in the manner most beneficial to said bondholders, and said trustees may make title thereto to all persons and corporations, purchasers who may be permitted by the constitution of this State to hold lands therein, till the whole of said lands are sold. All moneys realized from said trust property shall be distributed so that all holders of said bonds who may have surrendered the same to the governor, or as directed in said act approved February 23d, 1876, shall receive their proportionate share thereof, but the residue shall be retained by said trustees and be distributed to the several holders of bonds in their respective proportions only when they shall surrender their said bonds, as provided in the said act of February 23d, 1876; but the trust hereby created shall be closed at the end of ten years from the first day of May, 1876, after which date all of said bonds described in the fifteenth section of said act approved February 23d, 1876, not then presented and surrendered shall become barred of all right to participate in the benefits of this trust or share in the proceeds thereof, and shall have no claims against this State, and all money then in the hands of said trustees, part of said trust estate, shall be distributed *pro rata* among the holders of said bonds who shall have surrendered the same, and all lands then remaining unsold shall be conveyed by such trustees to such persons so entitled to share in said trust moneys or to such person or persons as they may direct. The said bonds and mortgages of said railroad company herein assigned to the said trustees shall be by them held to protect the title of the said trustees and the rights of those beneficially interested therein, and shall not by this assignment be held to be extinguished or in any manner impaired, but shall remain an existing security for the purpose aforesaid. Said trustees, for their services,
120 shall be paid such commissions upon the proceeds of collections and sales as the majority in number and value of the bondholders as shall have surrender-d their bonds may determine. The said trustees shall give notice of their appointment and of the terms of this trust at least four times in each year by advertisement in the London Times newspaper and in one daily newspaper in the city of New York.

In witness whereof I, George S. Houston, as governor of the State of Alabama, by virtue of the authority by the said act of the General Assembly of Alabama approved February 23d, 1876, in me vested, have set my hand and caused the great seal of the State of Alabama to be hereto affixed on this the eighth day of February, A. D. one thousand eight hundred and seventy-seven.

GEORGE S. HOUSTON,
As Governor of the State of Alabama.

Sworn to and subscribed before me this the 8th day of February, 1877.

C. D. WHITMAN,
Notary Public.

THE STATE OF ALABAMA, }
Montgomery County. }

I, C. D. Whitman, a duly authorized and commissioned notary public of said State, hereby certify that George S. Houston, whose name is signed to the foregoing conveyance and who is known to me, acknowledges before me this day that, being informed of the contents of the conveyance, he, as governor of said State of Alabama, executed the same voluntarily on the day the same bears date. Given under my hand this the eighth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

C. D. WHITMAN,
Notary Public.

121 STATE OF ALABAMA, }
County of Jefferson. }

I, Henry L. Wheeler, a notary public in and for said county and State, hereby certify that the foregoing is a true and exact copy of the original. Witness my hand and seal this the 8th day of October, A. D. 1884.

HENRY L. WHEELER,
Notary Public for Jefferson County, Alabama.

Endorsed on the foregoing is the following: Filed in office this October 11th, 1884. A. O. Lane, register.

The joint and several answers of John N. Jenkins, Julia B. Berry, W. J. Van Kirk, E. A. Taylor, and Wm. S. Winsted to the bill of complaint filed against them and others in the chancery court of Jefferson county, Alabama, July 15th, 1884, by D. B. Miller.

These defendants jointly, as well as severally, refer to and adopt the answer of their codefendants, John Swann and John A. Billups, filed in this cause as the answer of each of these defendants to said bill, and deny each allegation of said bill which is not clearly admitted by said answer of Swann and Billups; and each of these defendants also adopts the demurrers and grounds of demurrer to

said bill which said Swann and Billups have filed with their answer in said cause, and prays that said bill be dismissed as to each of them.

RICE & WILEY,
Sol's for said Jenkins, Berry, Vankirk, and Winsted and Taylor.

Endorsed on the foregoing is the following: Filed in office October 11th, 1884. A. O. Lane, register.

122 In Chancery, at Birmingham, Eighth District, Western Division of Alabama.

D. B. MILLER
vs.
JOHN SWANN, Trustee, *et al.*
} At Rules, Before the Register, this Monday, 27th October, 1884.

Decree Pro Confesso against Ellis Phelan.

In this cause, it being made to appear to the register that a summons requiring the defendant Ellis Phelan to appear and plead to or answer the bill of complaint in this cause within thirty days from the service upon him was served upon *by* him by the sheriff of Jefferson county on the 24th day of July, 1884, that the said defendant having failed to plead to, answer, or demur to the said bill to the date hereof, it is now, therefore, on motion of complainant's solicitor, ordered and decreed that the said bill of complaint in this cause be, and it is hereby, in all things taken as confessed against the said Ellis Phelan, the defendant aforesaid.

A. O. LANE, *Register.*

Endorsed on the foregoing is the following: Granted 27th day of October, 1884. A. O. Lane, register.

EXHIBIT B TO DANIEL J. DUFFY'S DEPOSITION, INFRA.

Entry-taker's office, Ala. & Chatta. Railroad Company.

CHATTANOOGA, TENN., *January 24th*, 1871.

This is to certify that I, Daniel J. Duffy, land commissioner of the Alabama & Chattanooga Railroad Company, successor to the Wills Valley Railroad Company, for the sale of lands granted to said company by act of Congress approved June 3d, 1856, and subsequent act of Congress to the Alabama & Chattanooga Railroad Company, reviving said act of June 3d, 1856, approved April 10th, 1869, have this day sold to Joab Bagley, of the county of Jefferson,
State of Alabama, the southeast ¼ of the northwest ¼ of sec-
123 tion 5, in township 18, of range 2 west, containing forty acres,
situated in Jefferson county, Alabama, according to the original survey, at two dollars and a half per acre, amounting to one hundred dollars, twenty-five dollars paid in hand and the remain-

ing due and to be paid in three equal instalments, with legal interest from date thereof. This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company, by its president, secretary, or other duly authorized agent, when the full amount of the purchase-money with its interest is paid.

And it is further agreed by the said Joab Bagley that in accepting this certificate if any portion of the purchase-money and interest shall remain unpaid sixty days after the last instalment is due the entry-taker of the Alabama & Chattanooga Railroad Company may, upon giving thirty days' notice in three public places, one of which shall be his office and the remaining two in the county in which said land is situate, proceed to sell said above-described land in front of his office to the highest bidder for cash in hand without any further or other proceeding than the above.

Witness my hand and seal the day and date last above written.

THE ALABAMA & CHATTANOOGA RAILROAD CO.,
By DANIEL J. DUFFY, *Land Commissioner.*

I accept the provisions of the above certificate freely and voluntarily.

Witness my hand and seal this 24th day of January, A. D. 1871.

J. BAGLEY. [L. S.]

Signed, sealed, and delivered in the presence of *us:*
THOM. PETERS.

Endorsed on the foregoing exhibit is the following: Filed for record in my office on the 19th day of October, 1874. J. C. Morrow, judge of probate.

And this certificate was on the same day of the month and year duly recorded in Deed Book, vol. 21, pages 500, '1

J. C. MORROW,
Judge of Probate.

124 EXHIBIT A TO DEPOSITION OF DANIEL J. DUFFY, INFRA.

Entry-taker's office, Alabama & Chattanooga Railroad Company.

CHATTANOOGA, TENN., *Sept. 13th*, 1870.

This is to certify that I, Daniel J. Duffy, land commissioner for the sale of the lands of the Alabama & Chattanooga Railroad Company, successors to the Wills Valley Railroad Company, for the sale of lands granted to said company by the act of Congress approved June 3d, 1856, and subsequent act of Congress to the Alabama & Chattanooga Railroad Company, reviving said act of June 3d, 1856, approved April 10th, 1869, have this day sold to Joab Bagley, of Elyton, of the county of Jefferson, State of Alabama, the S. E. ¼ of

the S. E. ¼ of section 1, township 18, range 3 west, and the W. ½ of N. W. ¼ and N. E. ¼ of N. W. ¼ of section- one and five, in township 18, range- 2 and 3 west, containing one hundred and sixty acres, situate in Jefferson county, Alabama, according to the original survey, at two dollars and a half per acre, amounting to four hundred dollars, one-fourth paid in hand and the remaining due and to be paid in three equal instalments, with legal interest from date hereof. This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company, by its president, secretary, or other duly authorized agent, when the full amount of the purchase-money with its interest is paid.

And it is further agreed by the said Joab Bagley that in accepting this certificate if any portion of the purchase-money and interest shall remain unpaid sixty days after the last instalment is due the entry-taker of the said Alabama & Chattanooga Railroad Company may, upon giving thirty days' notice in three public places, one of which shall be his office and the remaining two in the county in which said land is situate, proceed to sell said above-described land in front of his office to the highest bidder for cash in hand without any further or other proceedings than the above. The said Bagley having purchased the right to the mineral and mining privileges upon the said lands, the same are released by the Alabama & Chattanooga Railroad Company.

This January 24th, 1871.

By DANIEL J. DUFFY,
Land Commissioner.

I accept the provisions of the above certificate freely and voluntarily.

Witness my hand and seal this 13th day of September, A. D. 1870.

J. BAGLEY. [L. S.]

Signed, sealed in presence of *us:*
ARTHUR B. PAINE.

Endorsed on the foregoing is the following: Land certificate, A. & C. R. R. to J. Bagley. Filed for record in my office on the 19th day of October, 1874. J. C. Morrow, judge of probate. And this deed was on the 19th day of October, 1874, duly recorded in Deed Book, volume 21, pages 498, '9. J. C. Morrow, judge of probate.

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et als.*

Interrogatories to be Propounded to Daniel J. Duffy, Witness for the Complainant, who Resides at Chattanooga, Tennessee.

Int. 1. Where do you reside and how long have you so resided?

To the 1st interrogatory he saith: I reside in the city of Chattanooga, Tennessee, and have been resident of said city since the

early part of 1866, except during the year 1878; I was then temporarily absent in the city of St Louis, Missouri.

Int. 2. What position did you hold in September, 1870, and in January and February and March, 1871?

126 To the 2nd interrogatory he saith: I held the position of land agent or land commissioner for the Alabama & Chattanooga Railroad Company during the period named in 2nd interrogatory.

3rd Int. If you say that at said times you were land commissioner of the Alabama & Chattanooga Railroad Company, state when you first commenced to act as such and who first employed you, and state whether such employment was in writing or verbally; if in writing, attach a copy of same or the original to your deposition, and also state how long you continued to act as such commissioner.

To the 3rd interrogatory he saith: I first commenced to act in capacity of land commissioner for the Alabama & Chattanooga Railroad Company September 3d, 1870. I was appointed by J. C. Stanton, general superintendent of said company, who assured me that he had full power to make such appointment from the board of directors of said company. The appointment was verbal, but, in addition to the verbal appointment, J. C. Stanton published in the daily newspaper then published at Chattanooga, Tenn., a notice to the public, which continued for months, notifying all parties desirous of purchasing lands of the said Alabama & Chattanooga Railroad Company to call upon D. J. Duffy, at Chattanooga, Tennessee. I cannot give the exact language of the notice, because I have no copy before me or in my possession, but the above is the substance thereof. I acted as land commissioner or agent for said company from September 3d, 1870; continued up to August 12th, 1871, when I was notified by J. C. Stanton, general superintendent, to suspend sales of said lands.

Int. 4. What were your duties, and what did you do as such commissioner? State fully and whether you had an office and where it was located.

To the 4th interrogatory he saith: My duty as such land commissioner or agent was to make sales of the lands of the said Alabama & Chattanooga Railroad Company situated in the State of

127 Alabama, and when sales were so made either through myself or sub-agents, I prepared all papers at my office, in Chattanooga, Tennessee, where the headquarters of the land department were located. If a deed was to be executed, the same was prepared in my office, but was signed by J. C. Stanton, general superintendent of the road. If a bond for title or contract was executed, the same was signed by me as such land commissioner, and this was a part of my duty. My office was located at Chattanooga, Tennessee, and was in the building occupied by the Alabama & Chattanooga Railroad Company as the general offices of said company at Chattanooga, Tennessee, and where the office of the general superintendent, superintendent of transportation, local treasurer, general freight and ticket agent, and chief engineer had their offices, and was

known as the headquarters of said company at Chattanooga, Tennessee.

The company also had general offices, first at Boston, Massachusetts, and afterwards removed to New York city. These offices were occupied by the president, the treasurer, the secretary, and the directors of said company, and was known as the general offices of the company.

Int. 5. Did you or not during the month of September, 1870, make sale of any lands belonging to the Alabama & Chattanooga Railroad Company to Joab Bagley? If so, please state what lands, giving their description by section or parts of section, township, and range. Please look at the certificate or bond for title now shown you by the commissioner and state all you may know in regard to it and whether you executed it, and please state fully all the negotiations which led to the purchase of the land therein described by Joab Bagley, the price paid, how much cash and how much on credit, and how the credit payments were evidenced, and after you have done so will you please attach said certificate or bond for titles to your deposition and mark it by appropriate references?

128 To the 5th interrogatory he saith: I recollect to have made sales to Joab Bagley, of Elyton, Jefferson county, Alabama, either by myself or through my general agent, Thos. Peters, who had an office in Elyton for the sale of the lands belonging to said company within a certain district of which Elyton was the centre. All titles or papers, however, were made at the general land office at Chattanooga, Tennessee. Applications were received from purchasers by the different sub-agents of the land commissioner along the line and were forwarded to the general land office at Chattanooga, Tenn., where they were examined, and if the applications were approved by the land commissioner the title papers were made out and forwarded to the agent sending the application, who then closed up the trade with the applicant and gave the title paper to the applicant, upon the purchaser complying with the terms of the sale, which in some cases were a full cash payment, in which event a deed was given, signed by J. C. Stanton, general superintendent; in other cases a partial payment in cash was made and notes executed for the remainder; in that event a bond for title was given, signed by the land commissioner or land agent. The notes and cash or full cash payments, as the case might be, were returned to the general land office at Chattanooga, Tennessee, by the sub-agent and by the general land office were turned over to the local treasurer at Chattanooga, Tennessee. Not having the books of the land department in my possession, or any other reliable data, I cannot say positively whether a sale was made to Joab Bagley during the month of September, 1870, and for the same reasons I cannot give a description of the lands if the sale was so made, nor can I give the terms of the sale or the amount paid or the price. It is proper for me to say here that all the books and papers pertaining to or in any way connected with the land department of said company, which were in my possession, were during the year 1879, I

129 think, filed in the chancery court at Chattanooga, Tennessee, in the case of D. J. Duffy *vs.* Frederick Wolfe *et als.* and they have not been in my possession since. So that any statement I make now would be from memory, and hence I cannot give dates or descriptions of property or terms of sales of transactions occurring thirteen or fourteen years past.

I have just examined the paper handed me by the commissioner, being certificate No. 30, which was executed by the said Alabama & Chattanooga Railroad Company through me as its land commissioner. The paper bears date September 13th, 1870, and was executed at that time. I append said paper to my deposition and mark the same Exhibit A. On the face of said paper, about the centre, there seems to be an erasure, and at the bottom with a different ink the following words are inserted: "The said Bagley having purchased the right to the mineral and mining privileges upon said land, the same are released by —— —— this January 24th, 1871." Where the word "January 24" appears in said paper there has also been an erasure. What date appeared before January I cannot say. The price paid for the land in the first instance on September 13th, 1870, was $2.50 per acre. This was for agricultural interests. What arrangement or trade as to the mineral interest was made after September 13th, 1870, if any was made, I cannot say, as I have no books in my possession. There was a negotiation as to the mineral interests and mining privileges, but what was agreed upon and paid, if anything, I cannot now remember. The words above referred to, to wit: "The said Bagley having purchased the right to the minerals and mining privileges upon said land, the same are released by —— ——"—the word "this" and "1871" are all in my handwriting, but whether the word "January 24" is or is not I will not undertake to say, as it appears to be in a different colored ink, and I can see no reason why the former date written there should have been changed and making

130 the thing appear as if two separate transactions were had about the sale of the mineral rights and privileges. Where the erasure in the centre of the said paper appears is that part of the certificate where the reservation of the mineral rights and privileges were so reserved. This was always written in when a reservation was made, and the language used was as follows: "The Alabama & Chattanooga Railroad Company, for themselves and successors in office, hereby reserve the right to all minerals and mining privileges upon said lands." The credit payments were evidenced by notes.

Int. 6. Did you or not, after said time, sell any other parcel or tract of land belonging to the Alabama & Chattanooga Railroad Company to Joab Bagley? Please examine the certificate or bond for titles now shown you by the commissioner and state whether or not you executed it and upon the terms therein stated; how much cash was paid, and how much on credit, and how the deferred payments were evidenced, and, after you have so deposed, will you please attach the said certificate to your deposition and mark it with appropriate references?

To the 6th interrogatory he saith: I have examined certificate No. 237 or 257; I cannot say which, as the centre figure of the number seems to have been changed or overwritten. This paper now bears date "January 24th, 1871," but the original date, whatever it may have been, has been erased and the word "January 24th" inserted. The remainder of the paper up to and including my signature is in my handwriting, except the printed portion thereof. This paper conveys to Joab Bagley the S. E. ¼ of the N. W. ¼ of section 5, township 18, range 2 west, situated in Jefferson county, Alabama, and was sold to said Bagley at $2.50 per acre, twenty-five dollars of which were paid in cash and notes executed for the remainder. No mineral rights were reserved upon this tract. The date of January
24th, 1871, I am satisfied, is not the true date of the transac-
131 tion, but that — has been altered since it left my possession.
My reason for stating this so positively is that *in* the acceptance of the provisions of the certificate by the purchaser has also been changed; the acceptance could not possibly have been made or accepted until the paper was fully completed by me and forwarded to my general agent, Thos. Peters, when, if the paper was satisfactory to the purchaser, he accepted the provisions of the above contract and signed his name to the certificate thereto. I append said paper to my deposition and mark the same Exhibit B.

Int. 7. State how much money was paid to you by the said Joab Bagley on the above tracts of land and the times and what you did with the money so paid to you by the said Joab Bagley.

To the 7th interrogatory he saith: The amount of money paid by the said Joab Bagley upon the said tracts of land are as stated in the certificate—that is, on September 13th, 1870, Joab Bagley paid to my general agent at Elyton $100.00 in cash and executed three notes for $100.00 each, due in one, two, and three years, with interest from date, as shown by certificate marked Exhibit A.

On whatever the true date of Exhibit B may have been, said Bagley paid $25.00 in cash and executed three notes for $25.00 each, due in one, two, and three years, with interest from date, as shown by Exhibit B. What money, if any, was paid for the mineral interests and mining privileges under Exhibit A I cannot say. There was some correspondence about it, as I now remember, but just what that was or what was finally agreed upon I cannot remember. I recollect, in the first instance, when Bagley made the proposition to purchase the mineral interests and mining privileges upon the said land described in Exhibit A, he offered for part fifty cents per acre
additional, seventy-cents or one dollar per acre for another
132 part, and $1.50 per acre for another portion of it. This proposition I refused and asked $2.50 additional per acre for the whole tract, one-fourth cash and the remainder in three notes due in one, two, and three years, with legal interest of Alabama from date; but what was agreed upon finally I cannot say without books and papers, and I have heretofore explained what disposition I have made of them. The money received and the notes executed for these sales was turned over to Henry E. Waite, local treasurer, by me as land commissioner.

Int. 8. Please state whether or not your agency or position, if you say you were acting as land commissioner of the Alabama & Chattanooga Railroad Company in 1870 and 1871, was known to the authorities of the State of Alabama, especially the governor. State all you know on this point and whether or not you made any reports to the governor of Alabama and whether or not they were in writing or verbally. If in writing, attach same or copy and state every fact within your own knowledge going to show that the governor of Alabama knew that you were acting as land commissioner of the Alabama & Chattanooga Railroad Company in 1870 and 1871.

To the 8th interrogatory he saith: I cannot say positively that my agency or position was known to the governor of Alabama in person during the years 1870 and 1871, but my recollection now is that Governor Smith, during his administration as governor of Alabama, visited the offices of the said company at Chattanooga, Tennessee; for what purpose I do not know, but I recollect that he was shown through the various departments of said company by Mr. J. C. Stanton, and the workings of each department were explained to him, and, among others, he visited the land department. I was introduced to him by Mr. Stanton and requested to explain to him the workings of the department, and I did so. There were other Alabama State officers who visited the offices of said company
133 in Chattanooga, Tennessee. The secretary of state, C. A. Miller, was one. The other names I cannot remember. I made a report to the State of Alabama, or, more properly speaking, to James L. Tate, commissioner of industrial resources of Alabama, who had been appointed a receiver of the lands of the Alabama & Chattanooga Railroad Company by some proceeding of the chancery court in Etowah county, Alabama. He called for a report of all lands sold by the Alabama & Chattanooga Railroad Company, in behalf of himself as receiver and of Governor Lindsay. He informed me that he wished such a report to lay before the legislature of Alabama. This was in the latter part of 1871 or in the early part of 1872. The report was made out in writing of all lands sold by the Alabama & Chattanooga Railroad Company, either through me or former land commissioners, and was delivered by me in person to Mr. Tate at the state-house, in Montgomery, Alabama, where I now suppose it is. I have no copy.

Int. 9. State whether or not you made any report or reports of you- acts and doings as such commissioner to the head officers of the Alabama & Chattanooga Railroad Company. If in writing, attach same or a copy.

To the 9th interrogatory he saith: During the time I acted as land commissioner I made reports of sales of lands belonging to said company, made by me to J. C. Stanton as general superintendent of said company at Chattanooga, Tennessee. These reports were in writing and were made monthly. If by the head officers is meant the president, secretary, tre-surer, and directory, whose offices were in New York and Boston, as hereinbefore stated, then I say I made no reports to them, as none were called for. I was directed by Mr.

Stanton to make reports to him, and he as general superintendent approved my accounts for commissions. I cannot attach
134 copies of my reports, as everything pertaining to the land office in any way, manner, or form were either attached and taken in custody by the courts or have since been filed in court in the case D. J. Duffy *vs.* Frederick Wolfe *et als.* as aforesaid.

Int. 10. Will you please — every fact going to show that during the years 1870 and 1871 and until the Alabama & Chattanooga Railroad Company was thrown into bankruptcy the president, superintendent, and managing agents of the said company knew that you were selling the lands of the Alabama & Chattanooga Railroad Company donated to it by the act of April 10th, 1869, renewing the grant?

To the 10th interrogatory he saith: I cannot state of my own knowledge that the president, superintendent, and managing agents of said company knew that I was selling the lands of said company donated by the Congress of the United States. My appointment was from J. C. Stanton, the general superintendent, and who was in immediate charge at Chattanooga, Tennessee, of said railroad company, and who assured all its officers under him that he had full power and authority from the board of directors to do and perform any and every act necessary in and about said railroad company and its property in the South as fully as the president, secretary, and board of directors could. In other words, he stated that he was clothed with the power of general agent by the board of directors to do everything necessary in and about said railroad company and its entire property in the South. All officers of said company at Chattanooga—that is to say, its chief engineer, local treasurer, freight and ticket agent, contractors, and employees, as well as myself as land commissioner—accepted such authority and acted under it, and so, also, did every person who transacted business with said railroad company at Chattanooga or along its line in Tennessee, Georgia, Alabama, and Mississippi; and the authority of J. C. Stanton to do and perform any acts in any manner for said railroad company was never brought into
135 question to my knowledge until about the year 1877, when in a suit instituted by me against Frederick Wolfe *et als.* in chancery court at Chattanooga, Tenn., who were then claiming to control said company's lands under the debt-settlement act of the State of Alabama. I instituted suit for a balance of commissions due me on the sale of said lands. Then the question was raised by the defendants in said suit that J. C. Stanton had no authority to sell said lands or to appoint an agent for the purpose. I then appealed to Mr. Stanton for a copy of his authority under which he was assuming absolute control of the Alabama & Chattanooga Railroad Company and its property. He gave me a copy of the authority, and I herewith file a copy of the same, marked Exhibit C, and make it a part of my answer. I obtained this copy from Mr. Stanton in 1878, while I was taking depositions in said suit, during the month of May.

Int. 11. State anything else you may know that will benefit the complainant as if you were specially interrogated thereto.

WATTS & SON,
H. H. SHARPE,
For Complainant.

We suggest the name of C. P. Goree, who resides at Chattanooga, Tenn., as a suitable person to take the deposition of Daniel J. Duffy.

WATTS & SON,
H. H. SHARPE,
For Complainant.

To the 11th interrogatory he saith: I think I have fully set out the whole transaction and I know nothing further on the subject.

Upon the foregoing interrogatories is endorsed the following: Filed in office this November 24th, 1884. A. O. Lane, register.

136 *Cross-Interrogatories to be Propounded to Daniel J. Duffy.*

Cross-int. 1. If you say that you as land agent or agent of any kind have ever made any sale or agreement for the sale to Joab Bagley of any lands embraced in the present suit, then you will please state whether you had any authority, verbal or written, for making such sale or agreement for sale and from whom you derived or obtained such authority, and produce and attach to your answer as part of your answer a correct copy of any such written authority you had.

To the first cross-interrogatory he saith: I made sales of A. & C. railroad lands to Joab Bagley, of Elyton, Alabama, either in person or through my general agent, Thos. Peters, as its land commissioner under the appointment of J. C. Stanton, then its general superintendent, who appointed me verbally, as I now remember. I have stated my appointment fully in direct examination, and which land sold by me as aforesaid are described and shown in Exhibits A and B, hereto appended to examination-in-chief. All the authority I ever had to make sales of said lands was from J. C. Stanton, the general superintendent of said company, and was verbal.

Cross-int. 2. Do you know of any written authority which you have not set forth in your answer to the foregoing interrogatory? If so, attach a copy thereof to your answer hereto and make it a part of your answer hereto.

To the 2nd cross-interrogatory he saith: I know of no written authority appointing me land agent nor have I any such in my possession. My recollection is I was appointed verbally. I was appointed by J. C. Stanton, who was general superintendent of said company, who assumed to have authority to make such appointment, which assumption I never questioned and hence acted under said appointment, nor did I ever doubt his authority until
137 he furnished me with a copy of it, of which I have made a copy and made it a part of my answer-in-chief, marked "Ex-

hibit C," which paper speaks for itself. "Exhibit C" herein referred to is the only paper or resolution of the board of directors of said company under which Mr. Stanton assumed to take general control.

Cross-int. 3. Have you in your answers to the foregoing direct interrogatories and cross-interrogatories stated every matter, circumstance, and fact relating to anything concerning which you have testified that you believe will benefit any of the defendants? If not, state every such matter, circumstances, and fact which you believe may benefit any of the defendants as fully as if specially interrogated thereon.

SAMUEL F. RICE,
Sol. for Swann & Billups.

To the 3rd cross-interrogatory he saith: I have fully and fairly answered all the direct and cross interrogatories and given a correct history of the transaction with Joab Bagley which occurred in the latter part of 1870 and in the ea-ly part of 1871, so far as my memory now serves me, not having books and papers and other data to refer to, and I know of nothing that will benefit the defendants in this cause outside of the circumstance that after having read the paper under which Mr. Stanton assumed to act and under which authority he appointed me as land agent of said company I advised all who had purchased land from me as such agent to make the best settlement they could with the trustees under the debt-settlement act of Alabama. I know that Thos. Peters, of Birmingham, and Max L. Peters, of New York, accepted my advice, as I told them I had become interested in the purchase of some of the lands theretofore the property of said railroad company, and after having read the authority of J. C. Stanton from the board of directors I compromised with the trustees and surrendered the lands.

And further this deponent saith not.

DANIEL J. DUFFY.

138 I, C. P. Goree, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers, taken down and written by me in the words of the witness, Daniel J. Duffy, were read over to him; that he assented, swore to, and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of said witness; that I am not of counsel or kin to either of the parties to said cause, nor interested in the event thereof, and I enclose the said testimony, together with said commission and interrogatories, direct and cross, to the said register in chancery, whence the same emanated, as my full execution of said commission.

Given under my hand and seal this 17th day of January, 1885.

C. P. GOREE,
Commissioner.

On the foregoing deposition is endorsed the following: Published by order of court May the 25th, 1885. E. L. Clarkson, register.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

Commission to C. P. Goree.

To C. P. Goree, Esq., of Chattanooga, in the State of Tennessee, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioner to take the answers to the interrogatories and cross-interrogatories hereunto attached of Daniel J. Duffy, material witness for the complainant in a certain cause now pending and undetermined in our said chancery court, wherein D. B. Miller is plaintiff and John Swann, trustee, *et al.*, are defendants; and we do hereby authorize and empower you, the said commissioner, to call and cause to come before you the said witness at such place and time as you shall appoint and deposition on
139 oath to take touching his kno-ledge of the matters and things in controversy in said cause or proceeding; and the said deposition, when so taken by you, shall be subscribed by said witness and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness A. O. Lane, register of said chancery court, at office, in Birmingham, this 18th day of December, A. D. 1884.

A. O. LANE, *Register.*

EXHIBIT C TO DEPOSITION OF DANIEL J. DUFFY, SUPRA.

BOSTON, *January 26th*, 1869.

At a meeting of the board of directors of the Alabama & Chattanooga Railroad Company held this day it was voted that the general superintendent have entire charge of building and equipping the railroad, the power to buy all materials and make all contracts incident thereto, and that all employees of the company shall be under his charge and subject to his orders, with power to dismiss whenever he may deem it for the best interest of the road so to do.

ALBERT F. THAYER, *Sec't'y.*

A true copy.
Attest: J. RICHARDS.

Dated Washington D. C.

To Ellis Phelan:

On your assurance of Macgrane Coxe character, make him commissioner.

SAMUEL F. RICE.

We agree that Macgrane Coxe act as commissioner to take depositions of D. N. Stanton, John C. Stanton, and John Demerrett.

WATTS & SON & O. W. UNDERWOOD,
Sol's for Complainant.

140 The foregoing is a copy of an instrument of writing written on the Western Union Telegraph Company's blank and attached to the following commission, unmarked as exhibit or otherwise:

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

Commission to Macgrane Coxe.

To Macgrane Coxe, Esq., of New York city, in the State of New York, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioner to take the answers to the interrogatories and cross-interrogatories hereunto attached of D. N. Stanton, John C. Stanton, and John Demerrett, material witnesses for the complainant in a certain cause now pending and undetermined in our said chancery court, wherein D. B. Miller is plaintiff and John Swann and John A. Billups *et al.* defendants; and we do hereby authorize and empower you, the said commissioner, to call and cause to come before you the said witnesses at such time and place as you shall appoint and their depositions on oath to take touching their knowledge of the matters and things in controversy in said cause or proceeding, and that said depositions, when so taken by you, shall be subscribed by said witnesses and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 22d day of April, A. D. 1885.

E. L. CLARKSON, *Register.*

141 In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.* }

Interrogatories to be propounded to John C. Stanton, D. N. Stanton, and John Demerrett, witnesses for the complainant, all of whom reside in the city of New York, N. Y.

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, I, the commissioner therein named, have called

and caused to come before me D. N. Stanton, John Demerrett, rett, and John C. Stanton, the witnesses named in said commission, and said D. N. Stanton, on this first day of May, 1885, at my office, 55 Liberty street, New York city, having come and been duly cautioned and sworn by me to speak the truth, the whole truth, and nothing but the truth, the said D. N. STANTON did depose and say as follows:

Int. 1. What position did you hold in the Alabama & Chattanooga Railroad Company during the years 1869, 1870, and 1871?

To the 1st interrogatory he saith: I was a director and president in 1870 and, perhaps, in 1871. It was either in the latter part of 1870 or in 1871 that I resigned.

Int. 2. Do you know Daniel J. Duffy, of Chattanooga, Tennessee? If yea, how long have you known him? What position, if any, did he hold in the Alabama & Chattanooga Railroad Company in 1870 and 1871 and where did he keep his office? Who appointed him? Give the time as near as you can and state under what authority he was appointed, and make your statement on this point as full as you can; only give facts.

To the 2nd interrogatory he saith: I don't know Daniel J. Duffy. I have since I resigned been informed that he held the position of land agent, but I don't know of my own personal knowledge.

142 Int. 3. State whether or not the president and directors of the Alabama & Chattanooga Railroad Company knew of the appointment of Daniel J. Duffy to a position in the said company and whether or not they knew what position it was; state fully.

To the 3rd interrogatory he saith: I have been informed that he was appointed by the general superintendent, John C. Stanton. In my opinion, the power of John C. Stanton was sufficient to enable him to appoint all agents and employees of the company to perform all of its business to the extent that he might deem for its interest.

Int. 4. State whether or not the president and directors of the said Alabama & Chattanooga Railroad Company ever made any objection to the appointment of Daniel J. Duffy; state fully, and state whether or not they were fully advised as to his appointment and his duties under said appointment, and, if so, whether they disaffirmed said appointment. State facts only and please state fully.

To the 4th interrogatory he saith: I don't remember whether or not the president or directors did know of such appointment. I can answer nothing further to this interrogatory.

Int. 5. State any other fact you may know going to show that the appointment of Daniel J. Duffy to a position in the Alabama & Chattanooga Railroad Company in 1870, if you say he was appointed to one, was made with the authority of the directors of the Alabama & Chattanooga Railroad Company, and that they knew he was performing the duties pertaining to said appointment and made no objection thereto.

To the 5th interrogatory he saith: I don't remember anything about this interrogatory.

Int. 6. State any other fact that you may know that will benefit the complainant as if you were specially interrogated thereto.

To the 6th interrogatory he saith: I don't know of anything I can say in answer to this interrogatory.

WATTS & SON & O. W. UNDERWOOD,
Sol. for Complainant.

143 We suggest the name of William E. Cook, of # 25 Chambers street, New York, as a suitable commissioner to take the depositions of John C. Stanton, D. N. Stanton, and John Demerrett.

WATTS & SON AND O. W. UNDERWOOD,
Sol's for Complainant.

Said Swann and Billups, without waiving the condition upon which they waived further notice of the foregoing interrogatories and filed their cross-interrogatories to the above-named witnesses, suggest Charles W. Nettleton, a resident of New York city, as a commissioner to take the answers of said witnesses to said interrogatories and cross-interrogatories.

April 17th, 1885.

SAMUEL F. RICE,
Sol. for Swann and Billups.

In the Chancery Court of Jefferson County, Ala.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.* } Cross-Interrogatories.

The defendants Swann & Billups and other defendants for whom answers have been filed by Samuel F. Rice, as their solicitor, accept service of the interrogatories propounded by complainant to his witnesses John C. Stanton, D. N. Stanton, and John Demerrett, and propound the following cross-interrogatories upon the condition that every objection which can legally be made to each of the direct interrogatories and to each part thereof is to be deemed and taken as duly and actually made and as here and now written out:

Cross-int. 1 to D. N. Stanton. Are you the same J. C. Stanton whose deposition was taken by W. L. Eakin, as commissioner, at Chattanooga, Tennessee, on or about the 7th day of April,
144 1880, in a cause then pending in the circuit court of Jefferson county, Alabama, in which John Doe *ex dem.* Swann & Billups were plaintiffs and James A. Curry, J. F. B. Jackson, and J. M. Haygood were defendants? Were you examined in that case as a witness for any of the defendants and against Swann & Billups? Were you not examined by said Commissioner Eakin touching your authority to sell or convey or to authorize the sale and conveyance of the lands then known as the Alabama & Chattanooga railroad lands, said lands being embraced by the mortgage executed by Alabama & Chattanooga Railroad Company to the State of Alabama on March 2d, 1870, to secure the payment of a loan of $2,000,000.00 of the State bonds to that company under the act of

the legislature of Alabama approved February 11th, 1870, authorizing such loan on the terms therein shown?

To the 1st cross-interrogatory he saith: I am not John C. Stanton. I have no recollection of having ever been examined as a witness in the case referred to.

Cross-int. 2. In your said deposition taken by said Commissioner Eakin did you exhibit or show any written authority to you to sell or convey or to authorize the sale and conveyance of any of said lands? Did you not in said deposition, whilst testifying as to said lands, depose in substance as follows: "I was not an agent to sell the same"? Did you not in your said deposition express yourself to that effect? Did you in said deposition testify in substance the same in all material respects that you testify in your present deposition now taken or being taken in the case?

To the 2nd cross-interrogatory he saith: I have to repeat that I have no recollection of ever having been examined as a witness in any such case.

Cross-int. 3. How many times and in what cases have you been examined heretofore against said Swann and Billups or one of them touching the matter about which you are examined in the
145 present suit? When and in what courts can your former deposition above referred to be found? And state the month and year in which each of these depositions was given.

To the 3rd cross-interrogatory he saith: I have no recollection of ever having been examined against either of them touching the matter referred to.

Cross-int. 4. State the name and home of each director of the Alabama & Chattanooga Railroad Company in each of the following years: 1868, 1869, 1870, 1871, 1872, and 1880.

To the 4th cross-interrogatory he saith: I cannot remember the name and residence of the directors for the years referred to with accuracy asked for. As well as I can remember they were in the year 1868 R. M. Patton, of Huntsville, Alabama; John Demerrett, Lewis Rice, John P. Robinson, Samuel A. Carleton, Isasa T. Burr, Francis Dane, J. C. Stanton, Robert Treat Paine, and myself, all of Boston. During the other years mentioned there were several changes, which make it impossible for me to state their full names and residences.

Cross-int. 5. Who was president of the Alabama & Chattanooga Railroad Company and who was its secretary and keeper of its books in which its proceedings were recorded in each of the years above mentioned?

To the 5th cross-interrogatory he saith: D. N. Stanton was president, I think, elected in 1868 and continued so down to 1870. Albert F. Thayer was its secretary, as near as I recollect, from 1868 to 1870. He kept the books mentioned. I don't know who were the officers in 1880.

Cross-int. 6. Were not one or more books kept in which proceedings of the stockholders or directors of the Alabama & Chattanooga Railroad Company were entered? When and where did you last see any such book or books and in whose custody or control? Have you

neither knowledge nor belief where such book or books can
146 now be found? If you have, state it fully. Can you testify and do you testify that every such book or books has been destroyed; if so, when and where and how did such destruction occur?

To the 6th cross-interrogatory he saith: Yes; as I remember, there was a book kept for that purpose. I don't remember when I last saw such book, nor in whose control, but I think in hands of the attorney for myself and others of the old directors. I suppose it might be found. I think I know where it could be found. It has not been destroyed, as far as I know.

(Witness considers that he has fully answered the question and refused to answer further.—M. C.)

Cross-int. 7. If in answer to any of the direct interrogatories you have said anything as to your authority in relation to said lands, now state whether the authority you thus refer to was verbal or was in writing. If it was in writing, then attach every such writing or a copy thereof to your answers to this cross-interrogatory and state fully whether you saw such writing executed or have personal knowledge of its execution, and state, also, by whom it was executed, in whose presence, and in what month and year.

To the 7th cross-interrogatory he saith: I have not stated anything as to my authority in relation to the matters asked about in this cross-interrogatory.

Cross-int. 8. Where is the seal of the Alabama & Chattanooga Railroad Company adopted and used by it in 1868, 1869, and 1870; was not said seal used in making the several mortgages and bonds which said company did make and execute in 1868, 1869, and 1870; was not said seal impressed upon some or all of said mortgages or bonds; when and where and in whose control did you last see said seal; where is said seal now? If you assert or intimate that said seal is lost, then each of you will please de-cribe the seal fully and
will say whether the impression of the seal upon the mort-
147 gage executed by said company on March 2d, 1870, and upon the bonds thereby secured is a correct impression of said company. Why is it that said books of said company and said seal of said company have been made inaccessible to said Swann & Billups or to any other person wishing to establish the truth by them? Is it a fact that each of said books as well as said seal is inaccessible to each of you? If you or any of you can get access to any of said books or to said seal, then tell where each of them is and attach to your answers thereto what you know to be a true impression as well as description of said seal.

To the 8th cross-interrogatory he saith: I do not remember where the seal is; it was used in making the bonds and mortgages referred to, as I remember it. As I remember it, it was impressed upon some and my impression is upon all the mortgages and bonds referred to. I don't remember when, where, or in whose control I last saw said seal. I don't know where it is now. I do not intimate that it is lost. It was an ordinary corporation seal; that is the most

I can say about it. I believe the impression of the seal upon the mortgage executed by the company in March 2d, 1870, and upon the bonds thereby secured to be a correct impression of the seal of the company. I don't know anything about the seal or books being made inaccessible to anybody lawfully entitled to examine the same or to said Swann & Billups. I am not sure whether or not said books or seal are or are not inaccessible to me. I have nothing further to say in regard to the 8th cross-interrogatory.

Cross-int. 9. Have you and each of you answered fully every one of the foregoing inquiries without mental reservation?

To the 9th cross-interrogatory he saith: Yes.

Cross-int. 10. Who is the commissioner by whom your answers to these cross-interrogatories is taken down and certified? What is his business, profession, and age? Did you or one of you in
148 any way suggest him as a commissioner? Do you know Charles W. Nettleton, of the city of New York? How long has he been known as a qualified commissioner to take depositions?

To the 10th cross-interrogatory he saith: I suppose I am before Mr. Macgrane Coxe. I suppose he is a lawyer. I don't know his age. I did not in any way suggest him as commissioner. I know Charles Nettleton, of New York city. I do not know how long he has been a commissioner or anything about his qualifications.

D. N. STANTON.

Subscribed and sworn to before me this 5th day of May, 1885.

MACGRANE COXE,
Commissioner.

Each of the foregoing cross-interrogatories is hereby propounded to said D. N. Stanton and said John Denerrett and must be answered by each of them.

The said Swann & Billups hereby suggest Charles W. Nettleton as a commissioner to take the depositions of the above-named witnesses.

SAMUEL F. RICE,
Solicitor for all the Defendants for Whom he has Filed Answers.

In the Chancery Court of Jefferson County, Ala.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Interrogatories to be propounded to John C. Stanton, D. N. Stanton, and John Demerritt, witnesses for complainant, all of whom reside in the city of New York.

Int. 1 to John C. Stanton alone. What position did you hold in the Alabama & Chattanooga Railroad Company during the years 1869, 1870, and 1871?

And the said John C. STANTON, on the 4th day of May,
149 1885, at my said office, having been likewise duly cautioned and sworn, did depose and say as follows:

To the 1st interrogatory he saith: I was the superintendent and agent for the transaction of all its business in the South.

Int. 2. Do you know Daniel J. Duffy, of Chattanooga, Tenn.? If yea, how long have you known him? What position, if any, did he hold in the Alabama & Chattanooga Railroad Company in 1870 and 1871 and where did he keep his office? Who appointed him? Give the time as near as you can and state under what authority he was appointed, and make your statement on this point as full as you can; only give facts.

To the 2nd interrogatory he saith: Yes, sir; I have known him since the latter part of 1868 or first part of 1869. He was the land agent of the company in 1870 and 1871. He kept his office at Chattanooga, Tennessee. I appointed him, as near as I can recollect, in the first part of 1869. I was appointed by the board of directors of the Alabama & Chattanooga Railroad Company, with full power to appoint any agent or agents or employees, of whatever grade, and also had full power to dismiss the same at any time I saw fit. I appointed Mr. Duffy the same as I did any other servant of the company. My acts were always approved of, as far as I know, by the board. I always reported regularly to the president and board of directors.

Int. 3. State whether or not the president and the directors of the Alabama & Chattanooga Railroad Company knew of the appointment of Daniel J. Duffy to a position in the said company and whether or not they knew what position it was. State fully.

To the 3rd interrogatory he saith: Yes, sir; they knew it.

Int. 4. State whether or not the president and directors of the said Alabama & Chattanooga Railroad Company ever made any objection to the appointment of Daniel J. Duffy. State fully, and
150 state whether or not they were fully advised as to his appointment and his duties under said appointment; and, if so, whether they disapproved said appointment. State fully and state facts.

To the 4th interrogatory he saith: They never made any objection, to my knowledge. They were fully advised of his appointment. Some time in 1869 I was present at a meeting of the board of directors. I asked them to appoint Mr. Duffy as general agent to take entire charge of the lands. The board refused to do that, but agreed that I might appoint him as my assistant to sell lands, and directed me to do so. This I did, he having the sale of all the lands which were sold, Mr. C. and I signing bonds for title and deeds for same, and they as a board approved the appointment of Mr. Duffy for the latter purposes.

Int. 5. State any further fact that you may know going to show that the appointment of Daniel J. Duffy to a position in the Alabama & Chattanooga Railroad Company in 1870, if you say he was appointed to one, was made by authority of the directors of the

Alabama & Chattanooga Railroad Company, and that they knew he was performing the duties pertaining to said appointment and made no objection thereto.

To the 5th interrogatory he saith: As I have already stated, they knew of his appointment and that he was performing the duties of land agent, as above described, and I never heard of any objection made by directors.

Int. 6. State fully any other fact that you may know that will benefit the complainant as if you were specially interrogated thereto.

To the 6th interrogatory he saith: The notes which were given for the lands by the different purchasers were sent to the president or treasurer in New York. The assignee in bankruptcy, after the road went into bankruptcy, Mr. Fred. Wolfe, made a demand on the former president for the notes. He delivered them to him
151 in amount, as I recollect, about from seventy-five to one hundred thousand dollars. Mr. Wolfe told me that he delivered them to Mr. John Swann. These notes were received on account of purchases of these lands. The company must have and did know all about the sales of those lands, as report was made to them from time to time, and they always approved of said sales, as far as I know.

Cross-Interrogatories.

Cross-int. 1. Are you the same J. C. Stanton whose deposition was taken by W. L. Eakin, as commissioner, at Chattanooga, Tennessee, on or about the 7th day of April, 1880, in a cause then pending in the cir- court of Jefferson county, Alabama, in which John Doe *ex dem.* Swann & Billups were plaintiffs and James A. Curry, J. F. Jackson, and J. M. Haygood were defendants? Were you examined in that case as a witness for any of the defendants and against Swann & Billups? Were you not examined by said Commissioner Eakin touching your authority to sell or convey or to authorize the sale and conveyance of the lands then known as the Alabama & Chattanooga railroad lands, said lands being embraced by the mortgage executed by the Alabama & Chattanooga Railroad Company to the State of Alabama on March 2d, 1870, to secure the payment of the loan of 2,000,000 dollars of the State bonds to that company under the act of the legislature of Alabama approved February 11th, 1870, authorizing such loan on the terms therein shown?

To the 1st cross-interrogatory he saith: I am. I recollect having testified in that case, but I don't know whether it was for plaintiff or defendants. I think I was examined by Commissioner Eakin touching the matters asked of.

Cross-int. 2. In your said deposition taken by said Commissioner Eakin did you exhibit or show any written authority to you
152 to sell or convey or to authorize the sale and conveyance of any of said lands? Did you not in said deposition, whilst testifying as to said lands, depose in substance as follows: "I was not an agent to sell the same"? Did you not in your said deposi-

tion express yourself to that effect? Did you in said deposition testify in substance the same in all material respects that you testify in your present deposition now taken or being taken in this case?

To the 2nd cross-interrogatory he saith: I don't remember whether I showed any such writing; if I did, the instrument will speak for itself. I might have done so, but do not now remember. I did not testify the words contained in the cross-interrogatory; neither did I express myself to that effect, as I now remember. I testified then in substance as I now testify.

Cross-int. 3. How many times and in what cases have you been examined heretofore against said Swann & Billups or one — them touching the matters about which you are examined in the present suit? When and in what courts can your former depositions above referred to be found? And state the month and year in which each of these depositions was given.

To the 3rd cross-interrogatory he saith: I don't remember but twice; it may have been more, but I don't remember it. I don't know the courts where such depositions could be found and I don't remember the month or year.

Cross-int. 4. State the name and home of each director of the Alabama & Chattanooga Railroad Company in each of the following years: 1868, 1869, 1870, 1871, and 1880.

To the 4th cross-interrogatory he saith: I don't remember about 1868. In 1869 the following were directors: D. N. Stanton, New York; I. T. Burr, S. A. Carleton, Lewis Rice, John M. Courtney, Francis Dane, John Demeritt, Robert Treat Paine, Jr., John
153 P. Robinson, J. C. Stanton, and William Claflin, of Boston; Robert Jemison and R. M. Patton, of Alabama, and Wm. P. Rathborn of Chattanooga. On or about November 3d, 1869, the following gentlemen resigned from the board: I. T. Burr, F. Dane, S. A. Carleton, John Demerritt, J. P. Robinson, and R. T. Paine, Jr., and the following were elected to fill vacancies: A. C. Lippett and F. B. Loomis, of New London, Ct., and Henry Clews, of New York. There may have been others, but I don't remember. These served, I think, pretty much up to October 9th, 1871, when the following board was elected: Wm. F. Drake, Henry Clews, and D. N. Stanton, of New York; F. B. Loomis and A. C. Lippett, of New London, Ct., and —— Rathborn, of Chattanooga. I don't remember the others. I can't tell anything about the directors in 1880.

Cross-int. 5. Who was president of the Alabama & Chattanooga Railroad Company and who was its secretary and keeper of its books in which its proceedings were recorded in each of the years above mentioned?

To the 5th cross-interrogatory he saith: D. N. Stanton was president, I think, from 1868 to the election of 1871, when Wm. F. Drake succeeded him, and Albert F. Thayer was secretary from 1869 to 1871, when, I think, Jere Richards succeeded him.

Cross-int. 6. Were not one or more books kept in which proceedings of the stockholders or directors of the Alabama & Chattanooga Railroad Company were entered? When and where did you last see any such book or books and in whose custody or control? Have

you neither knowledge nor belief where such book or books can now be found? If you have, state it fully. Can you testify and do you testify that every such book or books have been destroyed; if so, when, where, and how did such destruction occur?

To the 6th cross-interrogatory he saith: I never knew of but one such book. I saw it last, I think, at the company's office,
154 corner of Broadway and Wall street-, in this city, some time in the early part of 1871, I think. I do not now remember in whose custody, but it was in the company's office. I have no knowledge where they are now. I believe some of the old directors have them, but I don't know who. I don't testify that the book has been destroyed, for I don't know that it has been.

Cross-int. 7. If, in answer to any of the direct interrogatories, you have said anything as to your authority in relation to said lands, now state whether the authority you thus refer to was verbal or was in *in* writing. If it was in writing, then attach every such writing or a copy thereof to your answers to this cross-interrogatory, and state fully whether you saw such writing executed or have personal knowledge of its execution, and state also by whom it was executed and in whose presence and in what month and year.

To the 7th cross-interrogatory he saith: My recollection as to this is that I had two written authorities; one given me in the latter part of 1868 or early part of 1869, signed by the president and secretary, and later, in 1869, I got another extending my authority. I have lost both of them and am unable to find them, although I have made thorough search. The second gave me full power to do anything and everything that was to be done in the South in regard to the company's business. I don't remember seeing either of them executed. I know that they were executed, I think, by D. N. Stanton, pres., and Albert F. Thayer, sec't'y. They were executed—the first in the latter part of 1868 or early part of 1869 and the second later in 1869.

Cross-int. 8. Where is the seal of the Alabama & Chattanooga Railroad Company adopted and used by it in 1868, 1869, and 1880? Was not said seal used in making the several mortgages and bonds which said company did make and execute in 1868, 1869, and 1870?
Was not said seal impressed upon some or all of said mort-
155 gages or bonds? When and where and in whose control did you last see said seal? Where is said seal now? If you assert or intimate that said seal is lost, then each of you will please describe the seal fully and will say whether the impression of the seal upon the mortgage executed by said company on March 2d, 1870, and upon the bonds thereby secured is a correct impression of said seal of said company. Why is it that said books of said company and said seal of said company have been made inaccessible to said Swann & Billups or to any person wishing to establish the truth by them? Is it a fact that each of said books, as well as said seal, is inaccessible to each of you? If you or any of you can get access to any of said books or to said seal, then tell where each of them is and attach to your answers thereto what you know to be a true impression as well as description of said seal.

To the 8th cross-interrogatory he saith: I don't know where the seal aforesaid is. It was used in making those mortgages and bonds. As far as I know, it was impressed upon all of them, but that was not in my department. I saw it last in the company's office, in New York. I don't know in whose custody. I don't know where it is now. I have not seen it since. I don't know that it is lost. It was an ordinary corporation seal, with the name "Alabama & Chattanooga Railroad Company" upon it, as I now remember. I suppose it was affixed to the mortgage of March 2d, 1870. I know nothing to the contrary. I did not affix it myself. I don't know that they have been made inaccessible to Swann & Billups or to any other person seeking to establish truth by them. I don't know anything about it at all. Said books and seal are inaccessible to me. I have told fully all I know about said books and seal. I can't describe or make an impression of said seal.

Cross-int. 9. Have you and each of you answered fully every one of the foregoing inquiries, without mental reservation?

156 To the 9th cross-interrogatory he saith: I have.

Cross-int. 10. Who is the commissioner by whom your answers to these cross-interrogatories is taken down and cer-ified? What is his business, profession, and age? Did you or one of you suggest him as a commissioner? Do you know Charles W. Nettleton, of the city of New York? How long has he been known as a qualified commissioner to take depositions?

To the 10th cross-interrogatory he saith: Mr. Coxe. He is a lawyer. I don't know his age. I in no way suggested him as a commissioner. I used to know Mr. Nettleton. I don't know anything about his qualifications as a commissioner.

J. C. STANTON.

Subscribed and sworn to before me this 5th day of May, 1885.

MACGRANE COXE,
Commissioner.

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Interrogatories to be Propounded to John Demerritt.

And said JOHN DEMERRITT, on this 2d day of May, 1885, having come and been duly cautioned and sworn by me to speak the truth, the whole truth, and nothing but the truth, he did, the said day, at my office, No. 55 Liberty street, in New York city, depose and say as follows:

Int. 1. What position did you hold in the Alabama & Chattanooga Railroad Company in the years 1870 and 1871?

To the 1st interrogatory he saith: I did not hold any position in that company in the years 1870, 1871. I was a director in 1868 and 1869 and resigned in 1869.

157 Int. 2. Do you know Daniel J. Duffy, of Chattanooga, Tennessee? If yea, how long have you known him? What position did he hold in the Alabama & Chattanooga Railroad Company in 1870 and 1871?

To the 2nd interrogatory he saith: I do not know Daniel J. Duffy, of Chattanooga. I do not know what position, if any, he held in the company in 1870 and 1871.

Int. 3. By whom was the said Daniel J. Duffy appointed to this position, if you say he did hold a position in said company, and by what authority was the appointment made?

To the 3rd interrogatory he saith: I know nothing in regard to this interrogatory.

Int. 4. State whether or not the president and directors of the said Alabama & Chattanooga Railroad Company knew that Daniel J. Duffy had been appointed to a position in the said company and that they knew what position it was and that he was acting under it, and whether or not they made any objection thereto. State fully on this point.

To the 4th interrogatory he saith: I know nothing in regard to this interrogatory.

Int. 5. State any fact within your knowledge going to show that the directors of the Alabama & Chattanooga Railroad Company knew that Daniel J. Duffy was acting as agent of the said company for the sale of its lands in the State of Alabama granted to it by the acts of Congress and that they made no objection thereto. State fully.

To the 5th interrogatory he saith: I know nothing in regard to this interrogatory.

Int. 6. State fully any other fact that you may know that will benefit the complainant as if you were specially interrogated thereto.

WATTS & SON,
Sol's for Complainant.

To the 6th interrogatory he saith: Mr. John C. Stanton was the superintendent and general agent to manage the whole prop-
158 erty and build the road. He had full power to use his discretion in the management of the property and to appoint all agents and servants of the company. This is all I know.

Cross-Interrogatories.

Cross-int. 1. Are you the same J. C. Stanton whose deposition was taken by W. L. Eakin, as commissioner, at Chattanooga, Tennessee, on or about the 7th day of April, 1880, in a cause then pending in the circuit court of Jefferson county, Alabama, in which John Doe *ex dem.* Swann & Billups were plaintiffs and James A. Curry, J. F. B. Jackson, and J. M. Haygood were defendants? Were you examined in that case as a witness for any of the defendants and against Swann & Billups? Were you not examined by said Commissioner Eakin touching your authority to sell or convey or to authorize the sale

and conveyance of the lands then known as the Alabama & Chattanooga railroad lands, said lands being embraced by the mortgage executed by the Alabama & Chattanooga Railroad Company to the State of Alabama on March 2d, 1870, to secure the payment of the loan of $2,000,000 of the State bonds to that company under the act of the legislature of Alabama approved February 11th, 1870, authorizing such loan on the terms therein shown?

To the 1st cross-interrogatory he saith: I am not John C. Stanton. I was not examined in the cause nor by the commissioner mentioned.

Cross-int. 2. In your said deposition, taken by said Commissioner Eakin, did you exhibit or show any written authority to you to sell or convey or to authorize the sale or conveyance of any of said lands? Did you not, in said deposition, whilst testifying as to said lands, depose in substance as follows: "I was not an agent to sell the same"? Did you not, in your said deposition, express yourself to that effect? Did you, in said deposition, testify in substance the same in all material respects that you testify in your present
159 deposition now taken or being taken in this case?

To the 2nd cross-interrogatory he saith: No. My answer to the previous cross-interrogatory disposes of this one.

Cross-int. 3. How many times and in what cases have you been examined heretofore against said Swann & Billups or one of them touching the matter about which you are examined in the present suit? Where and in what court can your former deposition above referred to be found? And state the month and year in which each of these depositions was given.

To the 3rd cross-interrogatory he saith: I have never been examined in any case.

Cross-int. 4. State the name and home of each of the directors of the Alabama & Chattanooga Railroad Company in each of the following years: 1868, 1869, 1870, 1871, 1872, and 1880.

To the 4th cross-interrogatory he saith: During 1868 and 1869 the following were directors of the company and their residences respectively during the whole or a part of those years: S. A. Carleton, Lewis Rice, Rob't Treat Paine, Jr., Francis Dane, I. T. Burr, John P. Robinson, of Boston; R. M. Patton, of Alabama; John C. Stanton and D. N. Stanton, of Boston; John C. Courtney and myself, of New York. I think that included all the directors. I don't know about the other years enquired about.

Cross-int. 5. Who was president of the Alabama & Chattanooga Railroad Company and who was its secretary and keeper of its books in which its proceedings were recorded in each of the years above mentioned?

To the 5th cross-interrogatory he saith: D. N. Stanton was president from 1868 to 1872, I think. I don't know who was president in 1880. I think there were two or three secretarys during that time. One Thayer was one, and that is all I know.

160 Cross-int. 6. Were not one or more books kept in which proceedings of the stockholders or directors of the Alabama & Chattanooga Railroad Company were entered? When and where

did you last see any such book or books and in whose custody or control? Have you neither knowledge nor belief where such book or books can now be found? If you have, state fully. Can you testify and do you testify that every such book or books has been destroyed? If so, when, where, and how did such destruction occur?

To the 6th cross-interrogatory he saith: Regular books were kept. I last saw them in Boston, in the custody of D. N. Stanton, about 1869. I have neither knowledge nor belief where such books can now be found. I don't know whether or not they have been destroyed.

Cross-int. 7. If, in answer to any of the direct interrogatories, you have said anything as to your authority in relation to said lands, now state whether the authority you thus refer to was verbal or was in writing. If in writing, then attach every such writing or a copy thereof to your answers to this cross-interrogatory, and state fully whether you saw such writing executed or have personal knowledge of its execution, and state also by whom it was executed, in whose presence, and in what month and year.

To the 7th cross-interrogatory he saith: I have said nothing in regard to my authority in relation to said lands, for I never had any.

Cross-int. 8. Where is the seal of the Alabama & Chattanooga Railroad Company adopted and used by it in 1868, 1869, and 1870? Was not said seal used in making the several mortgages and bonds which said company did make and execute in 1868, 1869, and 1870? Was not said seal impressed upon some or all of said mortgages or bonds? When and where and in whose control did you last see said seal? Where is said seal now? If you assert or intimate
161 that said seal is lost, then each of you will please describe the seal fully and will say whether the impression of the seal upon the mortgage executed by said company on March 2d, 1870, and upon the bonds thereby secured is a correct impression of said seal of said company. Why is it that said books of said company and said seal of said company have been made inaccessible to said Swann & Billups or to any other person wishing to establish the truth by them? Is it a fact that each of said books as well as said seal is inaccessible to each of you? If you or any of you can get access to any of said books or to said seal, then tell where each of them is and attach to your answers thereto what you know to be a true impression as well as description of said seal.

To the 8th cross-interrogatory he saith: I can't state where the seal is. I don't know anything about whether it was used in making the bonds and mortgages referred to. I last saw it in the custody of D. N. Stanton, at the company's office in Boston, about 1869. I don't know anything about the seal and cannot describe it, nor do I know whether it was affixed to the mortgage referred to. I have no knowledge whatever of said books or seal having been made inaccessible to any one. I repeat I don't know anything about where they are. I have no occasion to know.

Cross-int. 9. Have you and each of you answered fully every one of the foregoing inquiries without mental reservation?

To the 9th cross-interrogatory he saith: Yes; I have.

Cross-int. 10. Who is the commissioner by whom your answers to

these cross-interrogatories *is* taken down and certified? What is his business, profession, and age? Did you or one of you in any way suggest him as a commissioner? Do you know Charles W. Nettleton, of the city of New York? How long has he been known as a qualified commissioner to take depositions?

162 —. Mr. Coxe, I suppose. I was introduced to him as such. I don't know his business, profession, or age. I never suggested him as a commissioner. I don't know Charles Nettleton, of this city, and don't know anything about him.

JOHN DEMERRITT.

Subscribed and sworn to before me this 6th day of May, 1885.

MACGRANE COXE,
Commissioner.

And I, Macgrane Coxe, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by me in the words of the witnesses above named respectively were by me read over to each of them respectively; that each of them assented to, subscribed, and swore to his several testimonies and answers in my presence at the times mentioned in the above parts respectively; that I have personal knowledge of the identity of said witnesses; that I am neither of counsel nor of kin to either of the parties to said cause nor interested in the event thereof; and I enclose said commission, together with said testimony and interrogatories, direct and cross, together with this certificate, to the said register in chancery, whence the commission emanated, as my full execution thereof. Given under my hand and seal this 6th day of May, 1885.

MACGRANE COXE,
Commissioner.

On the foregoing is endorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

163 In Chancery, at Birmingham, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, I, the commissioner therein named, have called and caused to come before *the* said Anthony Beers, Ellis Phelan, and Bayliss E. Grace, Sr., the witnesses named in said commission, on this the 22d day of December, 1884, at my law office, in the city of Birmingham, in said county and State, and, having duly cautioned and sworn the said witnesses to speak the truth, the whole truth, and nothing but the truth, the said witnesses, Anthony Beers, Ellis Phelan and Bayliss E. Grace, Sr., depose and say as follows:

The said witness, ANTHONY BEERS, having been first duly cautioned and sworn, as above stated, deposes and says as follows:

Int. 1. Where do you reside, and how long have you so resided?

To 1st interrogatory he says: I reside at Oxmoor, Jefferson county, Alabama, and I have resided there since June, 1875, except about two years, 1878 and 1879, and a part of 1880, but at those times I resided at Pratt Mines, in said county.

Int. 2. Do you know anything of the following tracts of land, lying in Jefferson county, Alabama, viz: The N. W. ¼ of section 5, township 18, range 2 west? If yea, state the character of the land, where situated, and in what does its chief value consist.

To 2nd interrogatory he says: I know of the lands enquired of. The lands are mountain lands, and their chief value consists in their iron ore. Some parts are valuable for agricultural purposes,
164 but only a very small part.

Int. 3. Have you had any connection with the Jefferson Iron Company during the years 1880, '1, '2, '3; if so, what? And state whether you have had anything to do with the listing of the above land for taxes and the payment of the taxes for the said years of 1880, '1, '2, '3. If yea, please state fully what you did, and if you paid taxes, State and county, on said lands please attach receipts for same, and if you haven't got the receipts state what has become of them.

To 3rd interrogatory he says: I was, during the years enquired of, general agent for the Jefferson Iron Company, looking after their property in Jefferson county, Alabama, paying taxes on the same, &c. I have listed the said lands for taxes and paid the taxes on them for the years 1880 and 1881, and I know that for the years 1882 and 1883 Dr. D. B. Miller has looked after and paid the taxes. I listed the taxes and paid them, as stated above, as general agent for the said company. I have not the receipts in my possession. They were sent to Pennsylvania.

Int. 4. To whom was the said land assessed for the year 1880, for the year 1881, for the year 1882, for the year 1883? If to the Jefferson Iron Company, please state how this happened instead of to Dr. D. B. Miller, and whether in paying said taxes, if you say you paid them, you were acting for said Dr. D. B. Miller as well as the Jefferson Iron Company. Please state the amount you paid for taxes for said Jefferson Iron Company for the year 1880; also for 1881, '2, '3; and state whether the above lands were included in the assessments of said company for said years.

To 4th interrogatory he says: They were assessed to the Jefferson Iron Company in 1880 and 1881, also in 1882 and 1883, and although the land was foreclosed under a mortgage in 1880 to Dr. D. B.
165 Miller it was still called and known as Jefferson Iron Company lands. The above explains how it happened they were assessed to said company. My answer above explains how and why they were assessed and that I paid taxes for 1880 and 1881 and that Dr. Miller paid them for 1882 and 1883, but still the assessment was not changed and I have explained why. For the year 1880 I paid as taxes on said lands seventy-eight and $\frac{50}{100}$ dollars; for year 1881

I paid fifty dollars; for 1882 and 1883 I do not recollect exact amounts paid, and they were paid by Dr. Miller. I attach two bank checks given by me to W. J. Mims, tax collector of said Jefferson county, for taxes as stated above and returned to me through the bank as paid checks, the one for seventy-eight and $\frac{50}{100}$ being for the year 1880 and that for fifty dollars being for year 1881, and request the commissioner to mark them respectively A and B Exhibits. The above-named lands were included in the assessments of said company for said years.

Int. 5. State any other fact you may know going to show that the Jefferson Iron Company was in possession and control of said above-described tracts from January 10th, 1873, to the year 1881, and that since that time Dr. D. B. Miller, as trustee, was in possession and control of said tract in section 5 *since that time* and as to the forty acres in section 1 until the sale of the surface of the said forty acres in section 1 to Ellis Phelan, in July, 1883, and any fact going to show the payment of the State and county taxes on said tracts for the years 1880, '1, '2, '3. Only state facts within your own knowledge and not what you have heard.

To 5th interrogatory he says: The said company held and controlled said lands just as they did all of their other iron lands from Jan. 10th, 1873, to the year 1881. Dr. Miller since that time was in possession just the same as the said company. He held as trustee and was in possession and control of said tracts in section
166 5 since that time. The forty acres enquired of were held just the same as the above-mentioned until sold to Ellis Phelan, in July, 1883. I have answered the balance of this interrogatory in my foregoing answers.

Int. 6. State any other fact you may know that will benefit the complainant.

To 6th interrogatory he says: In reply to this interrogatory I will state that Dr. D. B. Miller was resident in Oxmoor, in said Jefferson county, during the year 1882 and nearly all of 1883, and that Oxmoor is about six miles from the lands in controversy in this case.

Cross-Interrogatories to be Propounded to Anthony Beers.

Cross-int. 1. Please give the names of the person or persons that were in actual possession of the N. W. ¼ of section 5, township 18, range 2 west, and of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, from 1873 to 1883. If occupied in actual possession, state what particular part or forty was occupied by said person or persons and the nature or kind of dwelling used. In giving the name or names of the person or persons, if any, in actual possession of said lands state the year or years that said person or persons were in actual possession and state what acts said person or persons committed, within your knowledge, which would go to show they so had actual possession.

To 1st cross interrogatory he says: As I have stated in my answers to the direct interrogatories, there was no actual occupation of the said lands by Dr. D. B. Miller or by said company, but they simply

controlled the said lands as they did their other iron lands in this county. They had the lands located and the boundaries fixed and marked by a surveyor. There was no actual possession of the said lands by residence by any one, so far as I know.

167 Cross-int. 2. State if it is not a fact that neither Joab Bagley, James Thomas, James H. McKee, James W. Fuller, Jr., W. R. Thomas, D. B. Miller, Ellis Phelan, yourself, or any person as agent connected with said persons or with the Jefferson Iron Company ever lived upon said lands or held them by actual possession, and if it be so that any of said persons did reside upon and have actual possession of said lands give name or names of person or persons and describe the part of said land so occupied and give the year and month if possible of such occupancy.

To the 2nd cross-interrogatory he saith: I have already answered this interrogatory fully in my answer to the next preceding interrogatory.

Cross-int. 3. State if you have ever been over the N. W. ¼ of section 5, township 18, range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west; and, if so, how often and in what year or years. If yea, state by what distinguishable mark or marks you knew you were on said lands and on what particular part or parts of the said lands.

SAMUEL F. RICE,
Solicitor for the Defendants for Whom he has Filed Answer.

To the 3rd cross-interrogatory he says: I have been over both of the tracts inquired of in this interrogatory. I have been over them frequently. I don't know that I can state positively whether I have been on the said land since 1875, but previous to that time I have gone over them at least once a year and sometimes oftener. I went over them mainly to examine certain excavations that were made on said lands by the Jefferson Iron Company and to determine from said excavations the amount of ore, and also I went over the said land as stated above to inform myself of the outcrop of ore on said lands and the general features of the land. I did this

168 for said company, being employed to do so. My knowledge that I was on said lands was obtained by having the surveyor along with me, who pointed out the boundaries to me; also my general knowledge of the location of lands in Jefferson county, and my business was to have this knowledge, enabled me to know in a general way when I was on these lands.

ANTHONY BEERS.

Witness Beers claims attendance one day and seven miles travelled each way, 14 miles in all.

One day attendance	$1 50
14 miles travelled	70
Total	$2 20

EXHIBIT A to Deposition of A. Beers *In re* Miller *vs.* Swann *et al.*, in Chancery, at Birmingham, Alabama, Attached Dec. 22d, 1884. E. L. Clarkson, Register.

No. 1.

BIRMINGHAM, ALA., *April 7th*, 1881.

The National Bank of Birmingham

Pay W. J. Mims or order seventy-eight $\frac{50}{100}$ dollars, 78.50.

A. BEERS.

On the foregoing is endorsed: " W. J. Mims. Paid. T. L. Hudgins & Co., per Cameron."

EXHIBIT B to Deposition of A. Beers *In re* Miller *vs.* Swann *et al.*, in Chancery, at Birmingham, Ala., Attached Dec. 22d, 1884. E. L. Clarkson, Commissioner.

BIRMINGHAM, ALA., *June 19th*, 1882.

The National Bank of Birmingham

Pay to W. J. Mims, tax col., or order fifty dollars.

A. BEERS.

On the foregoing is endorsed: " W. J. Mims, T. C." Also endorsed the following: " T. L. Hudgins & Co., bankers, Birmingham, Ala."

169 The said witness, ELLIS PHELAN, having been first duly cautioned and sworn, as above stated, deposes and says as follows:

Interrogatories to Ellis Phelan.

Int. 1. Where do you reside and how long have you so resided?

To 1st interrogatory he says: I reside temporarily at Montgomery, Alabama, on account of holding the office of secretary of state, but my permanent residence is Birmingham, Alabama, where I have resided since 1873, and prior to then I resided at or near Elyton, in Jefferson county, Alabama.

Int. 2. Do you know anything of the purchase of the N. W. $\frac{1}{4}$ of section 5, township 18, range 2 west, and the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ section 1, township 18, range 3 west, in Jefferson county, Alabama, by Joab Bagley of the Alabama & Chattanooga Railroad Company in 1870 and 1871? If yea, state fully all you knew of it at the time or very soon thereafter.

To 2nd interrogatory he says: I knew of the purchase of said lands by Joab Bagley in 1870 and 1871 very soon after the said purchase was made, especially as to a forty-acre tract in section 1. In the early part of January, 1871, I went to Chattanooga, Tennessee, to purchase some lands of the Alabama & Chattanooga Railroad Company, and while there made application to Daniel J. Duffy, the land commissioner of said company, to purchase the S. E. $\frac{1}{4}$ of S. E.

¼ of section 1, township 18, range 3 west, and was informed by said Duffey that Joab Bagley, of Elyton, Alabama, had purchased the said tract in section 1.

Int. 3. Did you know anything of the purchase of said tracts by McKee, Fuller & Co. and McKee, Thomas & Co. from Joab Bagley in the year 1871 and the subsequent purchase of same by the Jefferson Iron Company? If so, state fully.

To 3rd interrogatory he says: I did know of the purchase of said tracts by McKee, Fuller & Co. from Joab Bagley in the
170 year 1871. I was practicing law at Elyton then and was consulted by Mr. James McKee, who came to Elyton to make the purchase and I knew of its consummation. It was a matter well known at the time at Elyton and was generally talked about, and I knew of the subsequent purchase of the said lands by the Jefferson Iron Company.

Int. 4. Do you know of any possession on the part of the Jefferson Iron Company of said tracts or any parts of them after their purchase, if you say there was a purchase?

To 4th interrogatory he says: I do not know of any actual possession of the said tracts of land, except that in the year 1877 or 1878 (I am not positive as to the year) a negro man named Ephraim Murphy cleared and cultivated and fenced about three acres in the N. E. corner of said section 1 under the authority of Mr. James Thomas, the then superintendent and acting as general manager of the Jefferson Iron Company. This possession, my best recollection is, continued until the said negro had made two crops.

Int. 5. Did you in 1883 purchase any portion of said tracts of lands? If yea, please state what particular part, give the date and year, and attach to your deposition a copy of the instrument or deed under which you hold said portion. State who was in possession of said land so purchased by you, if you say you made a purchase, at the time the deed or instrument was delivered to you and at the date of its execution. State fully the negotiations that led to the purchase of said tract on your part. State whether or not you went into immediate possession of said tract under said purchase and whether you have so continued ever since and whether or not you are now in possession of said tract.

To 5th interrogatory he says: I did make a purchase in July, 1883, of the said forty acres in section 1. The deed of Dr. D. B. Miller to me is dated July 16th, 1883, and I attach a copy of
171 said deed and request commissioner to mark it Exhibit C as a part of this my deposition in this case. I was in possession of said land on the 16th July, 1883, and at the time said deed was delivered to me, which was a few days after said 16th July. About the 1st of July, 1883, I found on running out the lands owned by me, just north of this said forty acres, that a two-room frame cabin (as will hereafter be explained by me) was partly on my land not in controversy and partly on the forty acres in controversy in this suit, and I also found that the lines as then run by the county surveyor came very a near a spring on my land not in controversy. This latter fact I had already known before. I

therefore went down to Oxmoor to see Dr. Miller and negotiate for the purchase of the said forty acres. Dr. Miller, the complainant in this case, agreed to sell me the surface interest for three hundred dollars, reserving to himself the mineral interests, and I was to pay him three hundred dollars in cash upon the delivery of the deed at the National Bank of Birmingham. Thereupon I went out to the land and found that the house mentioned above was unoccupied and both the doors were locked. I gained an entrance through the window on the north side, which window was in the part of the house on my land not in controversy, and I simply raised the sash, it not being fastened, and I then put in possession of the entire house a negro man named George Massey as my tenant, and he then and there agreed to become my tenant and to hold the premises for me and also the tract of forty acres in controversy, and he has been in actual possession of said house and said forty-acres tract as my tenant since then until now, and he holds it now as my tenant. When the deed was executed and delivered to me, viz., on or about the 16th July, 1883, I was in actual possession of the said house and of the said forty-acre tract in controversy.

172 Int. 6. Do you know Daniel J. Duffy and how long have you known him? In what business or occupation was he engaged in September, 1870, and in January, 1871? State fully all you may know in regard to the said D. J. Duffy being the agent of the Alabama & Chattanooga Railroad Company to sell the lands granted to the said company by the Congress of the United States during 1870 and 1871.

To 6th interrogatory he says: I do know Daniel J. Duffy and have known him since January, 1871. My best recollection is I met him in 1870. He was, in January, 1871, the land commissioner for the sale of the lands of the Alabama & Chattanooga Railroad Company, with an office at Chattanooga, Tennessee, in the building occupied by the superintendent and other officers of the said railroad company. About the 17th day of January, 1871, I called at the office of the said Duffy for the purpose of purchasing a tract of land in section 7, township 18, range 2 west, which said land corners with the S. E. corner of this forty acres in controversy, and then purchased of said Duffy, as land commissioner of the said company, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 7, township 18, range 2 west, for four dollars per acre, paying one-fourth cash and executing my three separate notes for the remainder in equal amounts respectively, payable at one, two, and three years respectively, with interest, and the said Duffy then executed and delivered to me a certificate called an "entry-taker's certificate." The said land in section 7 was a part of the land donated to the Alabama & Chattanooga Railroad Company by the act of Congress of 1856 and amendments thereto. I know of my own knowledge that one Hammaker also purchased of said Duffy, as such commissioner, 80 acres of land lying in Jefferson county, Alabama, in the year 1871.

Int. 7. State any other fact that you may know that will benefit the complainant as if you were specially interrogated thereto.

173 WATTS & SON,
H. A. SHARPE,
Attorneys for Complainant.

To 7th interrogatory he says: I desire to state, in reply to this general interrogatory, that after I had taken possession of the house mentioned in my answer to direct interrogatory I wrote to George B. Randolph, who was then residing in Talladega and who had erected this house, of what I had done and said to him that I did not wish to take any advantage of him, and that if he would let me know what the house cost him I thought it was very probable that I would reimburse him for the money he had laid out on the house. He answered me that he had laid out about one hundred and twenty-five dollars. I proposed to pay him fifty dollars in cash and by note, payable at National Bank of Birmingham on the 1st of January, 1884, the balance of fifty dollars. He accepted this proposition, and I paid him the one hundred dollars, which was a fair value for the house. It was distinctly agreed and understood that this was a mere gratuity on my part. I forgot to say and now state that when I took possession of the house as detailed above two negroes, named respectively Henry Morrow and Lawson Morrow, were cultivating the three or four acres that I have before testified to as having been cleared by Ephraim Murphy. I saw them and demanded possession of those three or four acres they were cultivating, and they then and there expressly agreed to hold said three or four acres as my tenants, and I agreed that they might when the corn was matured remove it; and when Dr. Miller's deed was delivered to me I was in the actual possession of the said three or four acres, as well as the other portion of the said forty acres.

We suggest the name of E. L. Clarkson, who resides at Birmingham, Alabama, as a suitable person to take the depositions of the above-named witnesses.

WATTS & SON AND
H. A. SHARPE,
Att'ys for Compla-nant.

174 In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Cross-Interrogatories to be Propounded to Ellis Phelan, Witness for Complainant.

Cross-int. 1. Please state who you found in possession of the S. E. ¼ of the S. E. ¼ of section 1, township 18 south, range 3 west, in 1883, the time you claim to have taken possession.

To 1st cross-interrogatory he says: I have already stated, in my

answer to direct interrogatories, how I found the house. It was unoccupied, and I placed my tenant, George Massey, in possession of it and took possession of the field in the N. E. corner, consisting of three or four acres. This three or four acres was a part of a field that had been cleared in the N. W. corner of S. ½ of the S. W. ¼ of section 6, township 18, range 2 west, which had been extended so as to include about three or four acres in the N. E. corner of the forty in controversy, and to a person not acquainted with the lines it was difficult to discover that these three or four acres were in section one instead of section 6; and the house occupied by one of these negroes—Lawson Morrow, who was a son of Henry Morrow—was in said section 6; and when I made the demand on said negroes for the possession of these three or four acres they readily agreed to give it up and made no claim thereto, only requesting to be permitted to gather the corn then being grown on the land, which I agreed to allow. When the deed of Dr. Miller was delivered to me I was in the actual possession of said three or four acres and the house above mentioned in said section and the whole of said forty acres in controversy. I desire to say that there was no enclosure around this said house. This house consisted of two rooms, the north gable being on my land not in controversy and the
175 line of my said land extending nearly to the first door on the north side, the doors of the house facing to the east.

Cross-int. 2. Be good enough to state if it is not a fact that when you took possession of that part of the house situated on the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, in 1883, that you found the door of said dwelling locked and that you thereupon entered the window of said house and opened the door from the inside; if otherwise please state how you did enter each and every part of the said house.

To 2nd cross-interrogatory he says: It is a fact that the doors were locked and that I gained entrance through the north window, which was on my land not in controversy, and this gave me entrance to the whole house, and the doors were opened from the inside, as there was a door between the two rooms which was not locked.

Cross-int. 3. Please answer if it is not true that you informed Mr. Geo. B. Randolph before you took possession aforesaid of the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, in the summer of 1881, at Birmingham, Alabama, that the said land was R. R. land and that the trustees, Messrs. Swann & Billups, could make him a good title, and state further if soon after conveying this information to said Randolph you did not apply to the agent of the aforesaid tract of land, to wit, the S. E. ¼ of the S. E. ¼ of section 1, township 18 south, range 3 west, and if you did not sign an application in which you offered or agreed to purchase laid land from said trustees.

To 3rd cross-interrogatory he says: It is not true that I informed Mr. Geo. B. Randolph before I took possession aforesaid of the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, in the summer of 1881, at Birmingham, Alabama, that the said land
176 was R. R. land, and that the trustees, Messrs. Swann & Bil-

lups, could make him (Randolph) a good title. I made no such statement nor gave him such information. On the contrary, I informed him at that time that I knew that Joab Bagley did purchase this land of the Alabama & Chattanooga R. R. Company in 1870 or 1871, and that said Bagley had sold it and conveyed it by deed to McKee, Thomas & Co., and that the Jefferson Iron Company were claiming it as their property; and I further state that I did not apply to the agent of the aforesaid trustees to purchase said tract of land, to wit, the S. E. ¼ of S. E. ¼, section 1, township 18, range 3 west, nor did I sign an application in which I offerred or agreed to purchase said land from said trustees. In the summer of 1881 I knew that George B. Randolph was wanting to purchase this said forty acres, and ever since my purchase or that of my wife of the land in section/ just north of this, in 1878, I had been anxious to purchase this land myself, on account of its giving me an outlet and being so near the springs on my land, and at the request of Frank Y. Anderson, the agent of said John Swann and John A. Billups at Birmingham, Alabama, I examined the records at the court-house in regard to the recorded evidence of title to this land. I failed to find any deed from the A. & C. R. R. Co. to Joab Bagley, but the record showed a copy of the entry-taker's certificate made by Daniel J. Duffy to Joab Bagley, an exhibit of which is attached to complainant's bill. I reported these facts to the said Anderson and told him that I knew at the time or very soon thereafter of the purchase of this forty acres in controversy by Joab Bagley. The said Anderson was anxious to sell me the land and offered to let me have it for fifteen dollars per acre and give me a warranty deed. I told him that while I was anxious to purchase if I could get a good title that I believed that Joab Bagley's title was the better title and would stand, and I also told Randolph of the status of the title to
177 this forty as shown by the records at the court-house and what I knew of it myself.

Cross-int. 4. State at the time you made said application to purchase said land from said trustees or their agent, in the summer of 1881, what person, if any, was in possession of said land or the house thereon.

To 4th cross-interrogatory he says: I distinctly state and reiterate that neither in the summer of 1881 nor at any other time since or before did I make application to the trustees or any of their agent or agents to purchase said tract of land. At that time (summer 1881) there was no house on said land and no clearing or fencing except the 3 or 4 acres before mentioned by me.

Cross-int. 5. Please state if Mr. George B. Randolph was not in possession of said land during June, July, and August and afterwards in the year 1881. When was George B. Randolph in possession of said land and how long was he in possession thereof? Did he not build and occupy a house thereon; and, if so, when?

To cross-interrogatory 5th he says: My best recollection is that soon after I made the investigation of the recorded title, as above detailed, I was informed that George B. Randolph was erecting a cheap two-room frame house on this forty in controversy. I had

occasion to go out to my place soon thereafter, and when I first saw the house I believed that it was erected entirely on my land not in controversy, but as at that time the land was in the woods and I paid very little attention to it I made no complaint. From that time on until about 1883, about June, I occasionally went out on my land, and there was a family of negroes occupying this house. I was informed at one time by a negro woman that she was paying rent to Capt. A. A. Tyler, of Birmingham, Ala., as the agent
178 of George B. Randolph, but when I went to take possession under my agreement to purchase as detailed in my direct examination there was no one in possession of said house. This land had become by its vicinity to Birmingham liable to encroachments by "squatters."

Cross-int. 6. Please answer if you did not attest as secretary of state, October 22d, 1884, the signature of E. A. O'Neal, governor of the State of Alabama, to a writing entered on the list certified from the Interior Department, at Washington, to the State of Alabama as to said land, conveying said land, to wit, the S. E. ¼ of the S. E. ¼ of section 1, township 18 south, range 3 west, to said trustees, Messrs. John Swann and John A. Billups.

SAMUEL F. RICE,
Solicitor for Those Defendants for Whom He Has Filed Answer.

To 6th cross-interrogatory he says: There was filed in my office as secretary of state, at Montgomery, Alabama, about October 22d, 1884, a certificate list from the Secretary of the Interior of the U. S. showing that the forty acres in controversy had been selected by the State of Alabama for the Alabama & Chattanooga Railroad Company under the acts of Congress relating to that subject, and the governor attached thereto his official certificate setting over to the said John Swann and John A. Billups, as trustees, all the rights and title of State of Alabama, subject, however, to the rights of all parties as set forth in the different acts of the legislature on this subject, and which said acts are particularly referred to in complainant's bill. This certificate of the governor, as a mere matter of form, received the signature of the secretary of state. This signature (the office of secretary of state I hold and *and* held then) was made by clerk, J. D. Barron, but with my full sanction and approval, and whether said question is intended to procure from witness an admission unfavorable to his rights he cares not, nor will he be deterred from doing anything in the line of his duty in his offi-
179 cial capacity, whatever effect it may have; but he did not suppose that the selection of this land, which was purely technical, could by any device be construed into a meaning derogatory to his private rights; and witness will state that there is on file in this office a report of the commissioners appointed for the purpose of setting apart the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, and the N. W. ¼ of section 5, township 18, range 2 west, by W. H. Crenshaw and L. H. Scruggs, who were the commissioners appointed by the State of Alabama to divide the lands in

the overlapping district of the S. & N. R. R. Co. and the A. & C. R. R. Co. to the said A. & C. R. R. Co. This document is dated January 28th, 1874, and I hereto attach a certificate copy of same and ask that it be marked Exhibit D, and I also ask permission to attach to this deposition copy of selection made of section 1 aforesaid by the State and have the same marked Exhibit E.

ELLIS PHELAN.

The examination was here adjourned at the conclusion as above of the testimony of the said witness Ellis Phelan, and the examination of the witness Bayliss E. Grace, Sr., continued until to-morrow, to be taken at same place, viz., my office as aforesaid.

Dec. 22d, 1884.

E. L. CLARKSON,
Commissioner.

The examination, having been adjourned yesterday as stated, was duly continued this day, and the said witness Bayliss E. Grace, Sr., then testified at the same place, my said office.

Dec. 23d, 1884.

E. L. CLARKSON,
Commissioner.

The said witness BAYLISS E. GRACE, Sr., having been first duly cautioned and sworn as above stated, deposes and says as follows:

Int. 1. Where do you reside and how long have you so resided?

To 1st inter-ogatory he says: I reside about a mile and a
180 half from the court-house at Birmingham, Alabama; have resided there for fourteen years and have resided in Jefferson county for sixty years.

Int. 2. Do you know anything of the purchase by Joab Bagley in 1870 and 1871 of the N. W. ¼ of section 5, township 18, range 2 west, and the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, Jefferson county, Alabama, of the Alabama & Chattanooga Railroad Company? If yea, state all you may know in regard to the said purchase.

To 2nd interrogatory he says: I know nothing personally of the purchase of the land enquired of in this interrogatory; but I know that Joab Bagley was claiming these lands as his in 1871 and that they were generally reported to be his.

Int. 2½. What was the character of said land- and where located and in what did their value consist? Were they suited for settlement and cultivation or were they mountainous and valuable for the iron ore on them?

To interrogatory 2½ he says: These lands were valuable only for the iron ore on them and they were not suitable for settlement or cultivation; a small value as to timber.

Int. 3. State what possession said Bagley took of these lands. Did he point them out to you and show you the said lands? State fully.

To interrogatory 3rd he says: Joab Bagley went with me and

showed these lands to me. I was acting as agent for McKee, Thomas & Co. and McKee, Fuller & Co., two iron firms, for purchase of iron lands for them, &c., and he (Bagley) pointed out these lands to me. He pointed out and described the lines and boundaries of these lands to me, claiming that they were his.

Int. 4. State whether or not the purchase of said lands by Joab Bagley was well known in the neighborhood. State fully.

181 To 4th interrogatory he says: The purchase of these lands was generally known in the neighborhood. This was known from the fact and generally known in the neighborhood that he (Bagley) claimed these lands as his.

Int. 5. Were you ever employed by McKee, Fuller & Co. and McKee, Thomas & Co. to try to effect a purchase of said lands from Joab Bagley, and what was the result? State fully, and the time, as near as *as* you can.

To 5th interrogatory he says: I was employed by McKee, Thomas & Co. and McKee, Fuller & Co. in 1871 (I don't recollect the month) to purchase these lands from Joab Bagley, and I succeeded in effecting such purchase at a price satisfactory to the parties, but I do not recollect the price.

Int. 6. If you say there was a sale by said Bagley to the above-named firms in 1871 of the said tracts, please state if the said McKee, Fuller & Co. and McKee, Thomas & Co. went into possession, and state the kind of possession.

To 6th cross-interrogatory he says: These firms did not go into actual residence possession or occupation, but these firms mentioned above went into such possession and held such possession of these lands as is the usual way in which minerals lands are held. Their deed was received and recorded at the court-house of this, Jefferson, county, Alabama.

Int. 7. Do you know who was their agent in Jefferson county during the years 1871 and 1872? If you say you were, state what you did in looking after said lands. Were they listed for taxes for the year 1872? If so, to whom, and who paid the taxes? If you have any receipt for same attach to your deposition.

To interrogatory 7 he says: I was agent for these firms in holding and attending to these lands for only a short time after their purchase by these firms. Mr. Thomas came down from the North and took charge of them himself, at least relieved me of them as

182 such agent, and I do not now recollect whether I listed and paid taxes on them or not.

Int. 8. Do you know for what purpose the said firms purchased the said tracts? If so, state it and whether they carried out their purpose.

To 8th interrogatory he says: The said firms purchased these lands for the purpose of working the ore from them in their business. They came down here and established a furnace at Irondale, in this county, forming the Jefferson Iron Company for that purpose. I do not know that they took iron ore from these lan-s, but they made iron at their furnace at Irondale, not more than three miles from these lands.

Int. 9. Do you know anything of the sale of said lands to the Jefferson Iron Co. in January, 1873? And state whether or not it was generally known in the neighborhood that the Jefferson Iron Company had purchased said tracts. State fully.

To 9th interrogatory he says: I know nothing about the purchase of these lands by the Jefferson Iron Company. I was not connected with them at the time enquired of.

Int. 10. State anything else you may know that will benefit complainant.

To 10th interrogatory he says: I know nothing more material of benefit to any of the parties in this case.

B. E. GRACE, SR.

Witness Grace claims one day's attendance, $1.50, and three miles travelled (both ways), 15c.; total, $1.65.

THE STATE OF ALABAMA, }
Jefferson County. }

In the case above stated.

I, E. L. Clarkson, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers
183 taken down and written in the words of the said witnesses, Anthony Beers, Ellis Phelan, and Bayliss E. Grace, Sr., each respectively, was read over to them each respectively; that each respectively assented, swore to, and subscribed the same in my presence at the times and place herein mentioned; that I have personal knowledge of the personal identity of said witnesses; that I am not of counsel nor of kin to any of the parties to said cause nor interested in the event thereof.

And I enclose the said testimony, together with the said commission and the interrogatories, direct and cross, to the said register in chancery, whence the same emanated, as my full execution of said commission.

Given under my hand and seal this 23d day of December, A. D. 1884.

E. L. CLARKSON,
Commissioner. [L. S.]

Costs.

Attendance of witness Beers, 1 day	$1 50	
Mileage	70	
		$2 20
" " Grace, 1 day	$1 50	
Mileage	15	
		$1 65
Fee of commissioner for taking the above depositions		$20 00
Total		$23 85

I certify the above as correct.
Dec. 23d, 1884.

E. L. CLARKSON, *Commissioner.*

EXHIBIT C to Deposition of Ellis Phelan *In re* D. B. Miller *vs.* John Swann and John A. Billups, in Chancery Court at Birmingham, Alabama, Dec. 22d, 1884. E. L. Clarkson, Commissioner.

THE STATE OF ALABAMA, }
Jefferson County. }

184 Know all men by these presents that for and in consideration of three hundred dollars to the undersigned grantors, D. B. Miller and his wife, Emma L. Miller, in hand paid by Ellis Phelan, the receipt whereof is hereby acknowledged, we do sell, remise, release, and forever quitclaim unto the said Ellis Phelan all of our right, title, and interest in and to the following-described lands, situated in Jefferson county, Alabama, viz., the S. E. ¼ of the S. E. ¼, in section 1, in township 18 S., range 3 west; but it is distinctly agreed that the said D. B. Miller and wife reserve to themselves, either for their own benefit or for sale to others, the exclusive right to the iron, coal, and other minerals contained in or upon said lands, with all necessary privileges for mining on said lands, and also the right of way for rail and tramways for mining purposes through any portion of said lands herein conveyed.

Given under our hands and seals this the 16th day of July, 1883.

D. B. MILLER. [SEAL.]
EMMA L. MILLER. [SEAL.]

THE STATE OF ALABAMA, }
Jefferson County. }

I, E. L. Clarkson, a notary public and *ex officio* J. P. in and for said State and county, hereby certify that D. B. Miller, whose name is signed to the foregoing conveyance, who is know- to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 16th day of July, 1883.

E. L. CLARKSON,
Notary Public and ex Officio J. P.

185 STATE OF KENTUCKY, }
County of Kenton. }

I, A. Kloentrup, a notary public in and for said county and State, hereby certify that Emma L. Miller, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, she executed the same voluntarily on the day the same bears date.

Given under my hand this 19th day of July.

A. KLOENTRUP,
Notary Public, Kenton County, Kentucky.

STATE OF ALABAMA, }
Jefferson County. }

I hereby certify that the within conveyance was filed in my office for record on the 25th day of July, 1883, and duly recorded in vol. 52 of D., page 282, on the 28th day of July, 1883.

JOHN C. MARSHALL.
Judge of Probate.

EXHIBIT D to Deposition of Ellis Phelan *In re* D. B. Miller *vs.* Swann & Billups, in Chancery Court at Birmingham, Alabama, December 22d, 1884. E. L. Clarkson.

Lands Set Apart to Alabama & Chattanooga Railroad Company by the Commissioners Appointed under the Laws of the State of Alabama.

Parts of sections.	Sec.	Town.	Range.	Land dist.	Acres.	Rate.	Val.
N ½, w ½ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	1	18	2 W.	Montgomery.	520	3 50	1,820 00
E ½, s ½ of s w ¼	3	"	"	"	400	2 50	1,000 00
S e ¼ of n w ¼, n ½ of ne ¼, s w ¼							
186 of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼	5	"	"	"	320	20 00	6,400 00
W ½ of n e ¼, n ½ of n w ¼, s e ¼	7	"	"	"	320	15 00	4,800 00
N ½ of n w ¼, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	17	"	"	"	360	4 00	1,440 00
E ½, e ½ of n w ¼, e ½ of s w ¼	19	"	"	"	480	2 50	1,200 00
N w ¼ of n e ¼, e ½ of n w ¼, n w ¼ of n w ¼, e ½ of s e ¼, s w ¼ of s e ¼, w ½ of s w ¼	25	"	"	"	360	4 00	1,440 00
E ½ of n e ¼, n w ¼ of n e ¼, n ½ of n w ¼, e ½ of s e ¼, s w ¼ of s w ¼	29	"	"	"	320	2 50	800 00
W ½ of n e ¼, w ½ of s e ¼, w ½	33	"	"	"	480	4 00	1,920 00

We, the undersigned commissioners, appointed under and by virtue of the laws of the State of Alabama to divide the land in conflict between the Alabama & Chattanooga and South & North Alabama railroads, granted to the State of Alabama by the Congress of the United States to aid in the construction of said
187 railroads, do hereby set apart and appropriate the above-designated lands to the said Alabama & Chattanooga Rail-

road Company as their proportion of lands in the above-named township.

Witness our hands this 28th day of January, A. D. 1874.

W. H. CRENSHAW,
L. H. SCRUGGS,
Commissioners.

Witnesses:
THOS. B. MADDOX.
K. M. CUNNINGHAM.

Lands Set Apart to Alabama & Chattanooga Railroad Company by Commissioners Appointed under the Laws of the State of Alabama.

Parts of section.	Sec.	Town.	Range.	Land dist.	Acres.	Rate.	Value.
S e ¼ of the s e ¼---	1	18	3 W.	Montgomery.	40	20 00	800 00
S w ¼ of n e ¼, n w ¼ of s w ¼-------	21	"	"	"	80	40 00	3,200 00
N ½ of n e ¼, s w ¼ of n e ¼, e ½ of n w ¼ ----------	29	"	"	"	200	40 00	8,000 00
N w ¼ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, w ½ of s w ¼ ----------	31	"	"	"	240	20 00	4,800 00

We, the undersigned commissioners, appointed under and by virtue of the laws of the State of Alabama to divide the lands in conflict between the Alabama & Chattanooga railroad and North & South Alabama railroad, granted to the State of Alabama by the Congress of the United States to aid in the construction of said railroad, do hereby set apart and appropriate the above-designated lands to said Alabama & Chattanooga Railroad Company as their proportion of lands in the above-named townships.

188

Witness our hands this 28th day of January, A. D. 1874.

W. H. CRENSHAW,
L. H. SCRUGGS,
Commissioners.

Witness-:
THOMAS B. MADDOX.
K. M. CUNNINGHAM.

OFFICE OF SECRETARY OF STATE,
MONTGOMERY, ALABAMA, *Dec. 30th*, 1884.

I do hereby certify that the foregoing lists of lands on pages one and two are true and correct copies taken from the original list which is on file in my office as an office document, subject to inspection in the same manner as the other papers and documents in my office and as other lists of R. R. lands.

Witness my hand the date above written.

ELLIS PHELAN,
Secretary of State.

EXHIBIT E to Deposition of Ellis Phelan *In re* D. B. Miller *vs.* Swann & Billups, in Chancery Court at Birmingham, Ala., Dec. 22d, 1884. E. L. Clarkson, Commissioner.

List No. 19. 4. 207.

F. C. C. W. J. W.

189 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October 7th*, 1884.

I, N. C. MacFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of lists numbered nineteen, containing a tract of land granted to the State of Alabama by the acts of Congress approved June 3d, 1856, and April 10th, 1869, to aid in the construction of certain railroads in said State, is a true and literal exemplification of the original approved list now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

List of lands in the district of lands subject to sale at Montgomery, Alabama, within the six-miles limits granted to the State of Alabama by the act of Congress approved 3d of June, 1856, entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," being a vacant and unappropriated tract of lands in the alternate sections, designated by odd numbers, for six sections in width on each side of the railroad herein named.

South of base line and west of Huntsville principal meridian, Alabama; selection June 17th, 1884; Montgomery district.

Tract of land within the conflicting six-mile limits of the Alabama & Chattanooga and South & North Alabama railroads.

S. E. ¼ of S. E. ¼, section 1, township 18 S., range 3 west, 39.95 acres.

190 GENERAL LAND OFFICE, *Sept. 19th*, 1884.

I hereby certify that the foregoing list has been compared with the swamp-land records of this office and found to be free from conflict.

D. F. PIERCE,
Chief of Swamp-Land Division.

RAILROAD DIVISION, GENERAL LAND OFFICE,
September 20th, 1884.

I hereby certify that the above-described tract is found free from conflict, and to inure to the State of Alabama under the acts of Congress approved June 3d, 1856, and April 10th, 1869, granting lands to said State to aid in the construction of certain railroads therein.

W. J. DRUMMOND,
Chief of Railroad Division.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept. 22d*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do certify that the foregoing on page one is a true and correct list of the tracts of lands within the six-mile limits granted to the State of Albama by the act of Congress approved June 3d, 1856, entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," being a vacant and unappropriated tract of land in the alternate sections, designated by odd numbers, for six sections in width on each side of the railroads named in the foregoing within the State of Alabama, covering 39.95 acres, and it is now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said acts of June 3d, 1856, and April 10th, 1869,
191 subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first above written.

N. C. McFARLAND,
Commissioner.

I. K. M. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Oct. 4th*, 1884.

Approved subject to the conditions and rights above mentioned.
F. M. TELLER, *Secretary.*

THE STATE OF ALABAMA, CHIEF EXECUTIVE OFFICE,
MONTGOMERY, ALA., *October 22d*, 1884.

Under the power vested in me as governor of the State of Alabama by the statutes of said State, including the act approved February 20th, 1883, entitled "An act in execution of the powers of the State of Alabama in relation to the lands granted to this State which are within fifteen miles from and on each side of the railroad known as the Alabama & Chattanooga railroad by the act of Congress of June 3d, 1856," etc.—

I hereby approve of the within lists of land to the trustees, John Swann and John A. Billups, mentioned in said act of February 20th,

1883, and hereby assign to and vest in them, as such trustees, so far as I, as governor of Alabama, am authorized by said statutes to do so, and only to that extent, all the right and title in and to the within-named lands which ever belonged to the State: Provided, however, that nothing herein contained shall prejudice any right to any of said lands which the Tennessee & Coosa River Railroad Company or any other railroad company may now own or claim.

In testimony whereof I have hereunto set my hand and
192 caused the great seal of the State to be affixed, at the capitol, in the city of Montgomery, the day and date above written.

E. A. O'NEAL, *Governor.*

By the governor:
ELLIS PHELAN,
Secretary of State.

OFFICE OF SECRETARY OF STATE,
MONTGOMERY, ALA., *December 20th*, 1884.

I hereby certify that the foregoing, on pages from one to five, inclusive, contain a true and correct copy, as the same is now on file in my office, of list No. 19, containing a tract of land selected by the Alabama & Chattanooga Railroad Company, and the approval and the certificate of the governor thereto.

ELLIS PHELAN,
Secretary of State.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. L. Clarkson, Esquire, of Birmingham, in the State of Alabama, or to one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of A. Beers, B. E. Grace, Sr., and Ellis Phelan, material witnesses for the complainant, in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is plaintiff and Jahn Swann, trustee, &c., *et al.*, defendants.

And we do hereby authorize and empower you, the said
193 commissioner, to call and cause to come before you the said witnesses, at such time and place as you shall appoint, and deposition on oath to take touching their knowledge of the matters and things in controversy in said cause or proceeding; and the said depositions, when so taken by you, shall be subscribed by said witnesses and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed the commission.

Witness A. O. Lane, register of said chancery court, at office, in Birmingham, this 18th day of December, A. D. 1884.

A. O. LANE, *Register.*

On the foregoing deposition was endorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, commissioner.

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, I, the commissioner therein named, have called and caused to come before me James Thomas, the witness named in said commission, on the twenty-seventh day of January, A. D. 1885, at the office of Wm. H. Glace, Esq., and, having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, JAMES THOMAS, the said witness, deposeth and saith as follows:

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS.

Interrrogatories to be Propounded to James Thomas, Who Resides at Catasauqua, Pa., a Witness for the Complainant.

194 Int. 1. Where do you now reside? Did you ever reside in Alabama? If yea, state at what time you commenced to reside in Alabama and how long you so resided and what business you were engaged in.

To 1st interrogatory he saith: I reside in the borough of Catasauqua, Pa. I did reside in Alabama. I commenced to reside there in September, 1870, and resided there about eight years, and was engaged as superintendent of iron works.

Int. 2. Do you know anything of the purchase by James McKee, James W. Fuller, and W. R. Thomas, partners under firm name of McKee, Fuller & Co., from Joab Bagley, of Elyton, Ala., of the N. W. ¼ of section 5, in township 18, of range 2 west, lying in Jefferson county, Alabama, on or about the 27th day of January, 1871? If yea, please state fully all you know in regard to said purchase and give the facts as fully as you can as to the possession of said firm of said tracts, whether it was actual or constructive. State fully and only give facts. What was the character of the land, where was it situated, and in what did its value chiefly consist?

To 2nd interrogatory he saith: I do not know of the purchase by McKee, Fuller & Co. from Joab Bagley, of Elyton, Ala., of the N. W. ¼ of section 5, township 18, range 2 west, lying in Jefferson county, Ala., on or about the 27th of January, 1871.

The land was bought from Joab Bagley by Mr. Grace, of Birmingham, Ala., for McKee, Fuller & Co. and afterwards sold to McKee, Thomas & Co. and by them sold to the Jefferson Iron Company, all of which firms and corporations I was a member. We never had any doubts of our possession, though a squatter by the name of O'Barr was on a fifty-acre tract and gave us some trouble, and we were unable to remove him from our inability to get our lawyers to

push a suit against Bagley to perfect his title from the Alabama & Chattanooga Railroad Company.

195 We were in actual possession from the fact that no one ever disputed our possession, and paid our taxes regularly for it and it was assessed to our names. We went upon and off the land, and, I think, took timber off as we needed it, and had the lines and boundaries surveyed by Mr. Hanby, a surveyor. The character of the land was mountainous and its value was in its iron ores.

Int. 3. Do you know anything of the purchase from Joab Bagley and wife by James H. McKee, James Thomas, James W. Fuller, Jr., William R. Thomas, and Joseph J. McKee, partners under name of McKee, Thomas & Co., on or about the 7th day of October, 1871, of the following tract of land, lying in Jefferson county, Ala., viz., forty acres on the Red mountain, known and designated as the S. E. ¼ of S. E. ¼ of section 1, township 18, of range 3 west? If yea, state all you know in regard to said purchase and whether or not said firm went into possession of said land under said purchase. State the character of the said possession; give the facts. What was the character of the land and in what did its value chiefly consist?

To 3rd interrogatory he saith: I do not know of the purchase from Joab Bagley and wife by McKee, Thomas & Co. on the 7th day of October, A. D. 1871, of that certain tract of land lying in Jefferson county, Alabama, viz., forty acres of iron land on the Red mountain, known and designated as the S. E. ¼ of the S. E. ¼ of section 1, township 18, of range 3 west. This land was bought in connection with 160 acres, being the N. E. ¼ of section 7, township 18, range 2 west, for which we paid, including the forty acres, the sum of $2,500.00. This deed is recorded in Deed Book, vol. 17, pp. 351-'2, on the 14th day of November, 1871, in the office for recording deeds in Jefferson county, Alabama, and these tracts were afterwards sold to the Jefferson Iron Company, and were always held in actual and

196 undisputed possession by both companies. These tracts were regularly assessed and the taxes were all invariably paid. There was a house on the land, which was rented by us to various tenants from time to time, and no question ever arose as to our legal and actual possession of the land. The character of the land was and is as follows: Forty acres on the Red mountain is mineral land, balance is timber, and a small part near and surrounding the house was cultivated from time to time. Its chief value was for its ore and timber; the ore was iron ore.

Int. 4. Do you know anything of the sale of the above-designated tracts of land by the two above-named firms to the Jefferson Iron Company on or about the 10th of January, 1873? If yea, state all you may know in regard to same, and whether or not the Jefferson Iron Company went into possession of said tracts under said purchase. State facts, and whether or not said possession was actual; and, if not actual, give the facts as to the kind of supervision or control the said company exercised over said tracts respectively and give a full account of same and for what purpose said Jefferson Iron Company purchased said tracts.

To 4th interrogatory he saith: I do know of the sale of the above-designated tracts of land by the said McKee, Thomas & Co. to the Jefferson Iron Company on or about the 10th January, 1873, though I am not quite sure as to date. The Jefferson Iron Company did go into immediate possession of said tracts under said purchase and held the same in undisputed and uninterrupted possession and rented the house thereon to different tenants from time to time and had the lines or boundaries surveyed and paid taxes thereon regularly. The said possession was actual, undisputed, open, and notorious. The said company by its agents went in and upon the land without let, hindrance, or question by or from any one and exercised a full control and supervision of the whole of said tract, and was purchased by the Jefferson Iron Company chiefly for
197 its mineral ore.

Int. 5. What position did you hold in the said Jefferson Iron Company, when did you first hold it, and how long did it continue? What business was said company engaged in and where? What were your duties and did you have any supervision and control of its lands?

As to 5th interrogatory he saith: The position I held in the Jefferson Iron Company was that of superintendent. I held it from the organization of the corporation. It continued for and until about the year 1874, a period of three or four years. The company was engaged in the manufacture of pig-iron at Irondale, Jefferson county, Alabama. My position was the management of the furnaces, real estate, and all property and interests of the corporation, and had exclusive supervision and control of its lands, which supervision continued while I remained in Alabama, which was in the spring of 1879, that I came back to Pennsylvania.

Int. 6. Whose duty was it to list the lands of said company for taxes? Do you know whether said lands were listed for taxes for the year 1872 by McKee, Fuller & Co. and McKee, Thomas & Co. as their property? If yea, state also whether or not they paid the taxes on said lands for said year. If you have the tax collector's receipts please attach them. If you haven't got them and cannot find them state whether or not you did pay the State and county taxes due on said lands for the year 1872.

To 6th interrogatory he saith: It was my duty to list the lands for taxes. They were listed in 1872 by McKee, Thomas & Co. as their property, and also paid the taxes for said year. I have not the tax receipts for 1872. I have looked for them, but cannot find them, but the tax collector's books and the assessments will show they were listed in our names and were paid by us.

198 Int. 7. Please state whether or not the Jefferson Iron Company paid taxes, State and county, on said lands for the years 1873, '4, '5, '6, '7, '8, '9. If you have any tax receipts for said years, please attach them, and, if you haven't got them, please state if you have made diligent search for them and whether they are lost or destroyed, and state particularly whether or not in listing the lands of the Jefferson Iron Company for taxes for the years 1873, '4, '5, '6, '7, '8, '9 you included the above tracts of lands.

To 7th interrogatory he saith: The Jefferson Iron Company paid State and county taxes for the years 1873, '4, '5, '6, '7, '8, '9. I have made diligent search for the tax receipts for the years mentioned. They are either lost or destroyed, except the years 1875, '6, '7, which are hereto attached and made part hereof and marked Exhibits "A," "B," and "C" respectively; and I further state in listing the lands for the years 1873, '4, '5, '6, '7, '8, '9 I included the above-described tracts of land.

Int. 8. State, if you have not already done so, any fact going to show that McKee, Fuller & Co. and McKee, Thomas & Co. paid the taxes on said tracts of lands for the year 1872 and that the Jefferson Iron Company paid the taxes on same for the years 1873,'4, '5, '6, '7, '8, '9.

To 8th interrogatory he saith: I paid particular, careful attention to this question of taxes, and therefore know that McKee, Thomas & Co. paid the taxes on said tracts of land for 1872 and the Jefferson Iron Company paid the taxes for the years 1873, '4, '5, '6, '7, '8, '9, but cannot state any facts in particular to make the evidence stronger than I have already given. I base my evidence on this tax question to the careful attention I always gave to the listing of the lands and payment of the taxes, and especially to these mineral tracts.

Int. 9. Did said company during the years 1880, '1, '2, '3 have any agent in Jefferson county to look after its interests? If yea, whom and where did he reside? Were you a member of the firm of McKee, Thomas & Co.?

199 To 9th interrogatory he saith: The said company, during the years 1880, '1, '2, '3, had an agent in Jefferson county to look after its interests. His name was Anthony Beers. He resides in Oxmoor, Ala. I was a member of the firm of McKee, Thomas & Co.

Int. 10. Do you remember anything of a negro man named Ephraim Murphy coming to you while you were at Oxmoor and asking permission to clear and cultivate a part of S. E. ¼ of S. E. ¼ of section 1, in township 18, range 3 west? If so, give a full statement of all that you did and whether or not you permitted the said Ephraim Murphy to clear and cultivate the said part. Give the date as near as you can.

To 10th interrogatory he saith: I do not now recollect anything of a negro man named Ephraim Murphy coming to me while I was at Oxmoor, Ala., and asking permission to clear and cultivate a part of S. E. ¼ of S. E. ¼ of section 1, in township 18, range 3 west, and do not remember of giving him permission to clear and cultivate said land.

Int. 11. State any other fact that you may know that will benefit complainant.

WATTS & SON AND
H. A. SHARPE,
Attorneys for Complainant.

To 11th interrogatory he saith: I do not know of anything that will benefit complainant.

We suggest the name of William Glace, Esq., who resides at Catasauqua, Pa., as a suitable person to take the deposition of James Thomas.

WATTS & SON AND
H. A. SHARPE,
Attorneys for Complainant.

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Cross-Interrogatories to be Propounded to James Thomas, Witness for Complainant.

200 Cross-int. 1. Please give the names of the person or persons, if any, that had actual possession of the N. W. ¼ of section 5, township 18 S., range 2 west, and of the S. E. ¼ of section 1, township 18 S., range 3 west, and state upon what part of said land said person or persons resided, and give the year or years during which said person or persons had actual possession of said lands.

To 1st cross-interrogatory he saith: McKee, Fuller & Co., McKee, Thomas & Co., and the Jefferson Iron Company always held from the time of their purchase quiet and undisturbed possession of section 5, township 18, range 2 west, and never delegated said possession to any one; but a squatter named O'Barr lived on a small part of the said tract of section 5, from which we were unable to remove him, from the fact that our lawyers would not move in the matter as we desired and urged; and as to the other tracts, known as the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 east, no one had actual possession except McKee, Thomas & Co. and the Jefferson Iron Company—except such person or persons as were our tenants in the house on said tract.

Cross-int. 2. If you gave permission to a colored man by the name of E. Murphy to cultivate a piece of land in Jefferson county, is it not a fact that said E. Murphy went upon and cultivated land claimed by you in section 7, township 18 S., range 2 west, and that he never cultivated any land whatever in the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west?

SAMUEL F. RICE,
Sol. for Those Defendants for Whom He Has Filed Answers.

As to 2nd cross-interrogatory he saith: I now have no knowledge or recollection of renting to Ephraim Murphy, a colored man, any part of either tracts of land.

JAMES THOMAS,
Witness, in Cross-Interrogatories.

201 I, William H. Glace, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers, taken down and written by me in the words of the witness

James Thomas, were read over to him; that he assented, swore to' and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of said witness; that we are not of counsel or kin to either of the parties to said cause nor interested in the event thereof, and we enclose the said testimony, together with said commission and the interrogatories, direct and cross, to the said register in chancery, whence the same emanated, as our full execution of said commission.

Given under my hand and seal this 27th day of January, A. D. 1885.

WM. H. GLACE,
Commissioner.

I, William Glace, a notary public in and for the borough of Catasauqua, county of Lehigh and State of Pennsylvania, do certify that the foregoing certificate is true.

WM. H. GLACE,
Notary Public, Pa.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

Commission to Wm. H. Glace, Esquire.

To Wm. Glace, Esq., of Catasauqua, in the State of Pennsylvania, or to such or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioner to take the answers to the interrogatories and cross-interrogatories hereunto attached of James Thomas, material witness for complainant in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is plaintiff and John Swann, trustee, &c., *et al.* are defendants; and we do hereby authorize and empower you, the said commissioner, to call and cause to come before you
202 the said witness, at such time and place as you shall appoint, and deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition, when so taken by you, shall be subscribed by said witness, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us under your hands and seals in all things fully and explicitly how you have executed this commission.

Witness A. O. Lane, register of said chancery court, at office, in Birmingham, this 18th day of December, A. D. 1884.

A. O. LANE, *Register.*

On the foregoing deposition is indorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JNO. A. BILLUPS *et als.*

Interrogatories to be propounded to George Massey and Ephraim Murphy, both of whom reside in Jefferson county, Alabama; also James E. Hawkins, of Elyton, Alabama.

To George Massey Alone.

Int. 1. Where did you reside in 1870, in 1871, and also state where you resided each year from 1871 to this time.

To 1st interrogatory George Massey saith: I lived in a place owned by Dr. N. Hawkins, known as the Parten place, in section 1, township 18, range 3 west, from 1870 till 1873, when I moved on a place I bought from Joab Bagley, about one-half mile east of the Dr. Hawkins place, and resided at this place belonging to me until 1877, when I moved back to the Dr. Hawkins place and lived there until the summer of 1883, when I moved on the forty-acre tract in controversy.

203 Int. 2. Do you know the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and how long have you known it? How far did you live from said forty acres in 1870; also in 1871 and each year since then? Explain the location of the place you lived on and how far it was from the said forty-acre tract. Describe it as accurately as you can. Give the distance of the house you lived in from said forty-acre tract.

To 2nd interrogatory he saith: I am acquainted with the said tract, for I lived on the Partin place during 1868 and 1869, besides the years testified in answer to interrogatory 1st. In 1870 I lived about 175 yards from the N. W. corner of said forty acres. My answer to 1st interrogatory explains how far I lived from said forty acres for the other years inquired of. The two houses on the Dr. N. Hawkins place that I lived in were not exceeding 175 yards from this land.

Int. 3. Do you know anything of the purchase of this land (S. E. ¼ of S. E. ¼, section 1, township 18, range 3 west) by Joab Bagley in 1870 and 1871? If yea, state all you know and especially everything that was done by Joab Bagley indicating ownership and possession of said forty-acre tract. State fully.

To 3rd interrogatory he saith: I know that about the year 1870 and 1871 Joab Bagley was claiming this land. I know it from this fact, that I had split some rails on this forty acres in controversy, intending to put them on the fence on the Hawkins tract, and Joab Bagley came and objected to my taking them off of the land, and he came himself with the wagon and carried them away to his residence near Elyton, Ala. Joab Bagley was on the land running out the lines himself, as he always carried about with him a pocket compass about the time I have mentioned above and explained to me how the lines run.

Int. 4. Do you know where the *the* northern line of the said forty-acres tract runs, and do you know of any controversy over a
204 spring very near the line between Joab Bagley and Dr. N. Hawkins? If yea, state when it occurred and how it was decided.

To 4th interrogatory he saith: I know where the northern line of this forty acre- runs. I know about the controversy between Joab Bagley and Dr. Hawkins over the location of a spring near the northern line of the forty acres in controversy, about the time testified to above, and it was decided that the spring was on Dr. Hawkins' land.

Int. 5. Do you know anything of a sale of said forty-acre tract by Joab Bagley? If yea, state all you know and the time as near as you can, and state to whom in the neighborhood the said forty-acre tract was said to belong from 1873 to 1883.

To 5th interrogatory he saith: I heard soon after this of a sale of this land to the Thomas Iron Co. of Irondale. It was called the Thomas Iron Company because Mr. Thomas managed it. The general neighborhood talk was that this forty-acre tract belonged to the Thomas Iron Company after the sale by Bagley, and this was the general talk in the neighborhood until some time in 1881, when a Mr. Randolph began erecting a house on it, when I heard that the railroad company claimed said land.

Int. 6. Do you know Ephraim Murphy? Do you know of his clearing, fencing, and cultivating any portion of said forty acres? If yea, state the time as near as you can, and state what Ephraim Murphy said while making the clearing, &c., as to who gave him permission to do so, and state by what authority he claimed the right to so clear and cultivate, and how long did he continue to cultivate this land if you say he did so.

To the 6th interrogatory he saith: I know Ephraim Murphy. He, Ephraim Murphy, cleared and cultivated about 5 acres of this forty acres in controversy. He said, while making the clearing, that Mr. Thoams gave him permission to clear as much as
205 he wanted, and he cleared and cultivated about five acres. He made, to my best recollection, three crops on said five acres.

Int. 7. State the charac-er of the land in said forty-acre tract and the way it lies. Is the neighborhood thinly or thickly settled? Are the settlements near or far apart?

To the 7th interrogatory he saith: The land is mountainous, running up to the top of the Red mountain. The neighborhood is thinly settled now. In 1870 to 1881 there were very few settlements in the neighborhood.

Int. 8. During the last two or three years has the neighborhood been troubled by squatters—that is, people who take possession and do acts of ownership without any claim or right? Have you had any trouble with such people? If yea, state whether any such people have done or attempted to do acts indicating ownership of said forty acres. Do you know anything of the erection of a house on said forty acres by one George B. Randolph? If yea, state

whether said Randolph ever occupied said house in person. How is said house located? Is it wholly on said forty acres, or does it lie partly in said forty-acre tract and partly on the land of Ellis Phelan?

To the 8th interrogatory he saith: The neighborhood has been very much troubled in the last two or three years by people who take possession of the land without any claim or right, and I have had a great deal of trouble in keeping such people off of the Dr. Hawkins tract, and also from this forty acres in controversy since I have been on it. They come out there and cut the timber and haul it off to town. I know that George B. Randolph did build a house on this forty acres in controversy in the summer of 1881. The said George B. Randolph resided in the house about two weeks, and then he moved off and rented it out to some colored people. The Randolph house lies partly on the forty acres in controversy and
206 partly on the Hawkins tract, now owned by Mr. Ellis Phelan. I know this, because I carried the chain for Mr. Ray, the county surveyor, when it was surveyed.

Int. 9. State anything else you may know that will benefit the complainant.

To the 9th interrogatory he saith: I was present in July, 1883, when Mr. Ellis Phelan demanded of Henry Morrow, who was cultivating this five acres cleared by Ephraim Murray, possession, and Mr. Phelan said to him that he had bought the forty-acre tract, but that he only wanted possession and did not care to deprive him of any right to the crop of corn growing thereon, and he asked said Morrow what his crop was worth, and said Morrow said he thought it was worth $30.00, and they agreed on $30.00 as the value of the crop. Said Phelan was to execute his note to the said Morrow, and with the understanding that when the crop was ready for gathering he, Morrow, was to notify me as the agent of Mr. Phelan if he wished to take the crop, and if he did I was to allow him to gather it, and he was to give up to me as agent for Mr. Phelan on the note; and he, Morrow, when the crop was ready for gathering came to me as the agent for Mr. Phelan and got permission to gather the crop, saying he was willing to take the crop and give up the note.

Interrogatories to be Propounded to George Massey.

Cross-int. 1. If you state that you are acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, please say if you have not known said land ever since your acquaintance with the same to be R. R. land and to be known as such and called R. R. land.

To the 1st cross-interrogatory he saith: Joab Bagley said it was railroad land before he bought it, and told me that he bought it from the railroad. I have heard it spoken of as the railroad land that was purchased by Judge Bagley since then. I have
207 heard it spoken of as the railroad forty.

Cross-int. 2. If you say that you now reside upon the said S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, in a house built by George B. Randolph, please state fully how you came

in possession of said land and house, who induced you to go into same, and whether, when you took possession of said house, you entered through the door or through one of the windows, and if you had to break said door or window to get in; and, if not, state how, and give the exact date you took possession of said house.

To the 2nd cross-interrogatory he saith: Mr. Phelan came to me and told me that he wanted me to take possession of the house as his tenant. I obtained an entrance by the direction of Mr. Phelan through the north window by raising up the sash, and there was a door between the two rooms, which was open; there was no one in the house at the time; a colored woman had been living in the house, but at that time she had gone up to Irondale. I was not quite ready then to move in said house, and in a few days after that the colored woman returned from Irondale with the key, which unlocked both doors, and she delivered up the key to me and she moved out and moved to the house I had been living in and I moved into the Randolph house and have been living there ever since. I broke no window nor door nor lock. It was in July, 1883, but I cannot remember the exact date that I took possession.

Cross-int. 3. Please state where you resided and in whose house before you took possession of the said Randolph house on the said S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west.

To the 3rd cross-interrogatory he saith: Mr. Ellis Phelan owned the house. I was living in a house belonging to Mr. Ellis Phelan on the Partin or Hawkins tract.

208 Cross-int. 4. If you say you resided in the house owned by one Ellis Phelan before you took possession of said house and land, please state if the said Phelan did not get you to leave this house you held under him and to move in and take possession of the house built by George B. Randolph upon the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west.

To the 4th cross-interrogatory he saith: Mr. Ellis Phelan did get me to move from the house I was living in and take possession of said Randolph house.

Cross-int. 5. Please state what inducements the said Phelan made you to make said move and every fact and circumstance within your knowledge connected therewith.

To the 5th cross-interro*ag*tory he saith: Mr. Ellis Phelan came to me and told me that he wanted me to move in the Randolph house and asked if I knew what the Randolph house had been renting for, and I told him that I understood it was five dollars per month; but as I was only paying three dollars a month for the house that I was living in, and I regarded it as a more comfortable house, he agreed to let me have it for three dollars a month.

Cross-int. 6. If you say you are acquainted with the spring over which Joab Bagley and Dr. N. Hawkins had a dispute, please state if it is not a fact that said spring is located upon the land known as the Hawkins tract, near the line dividing said tract from the S. E. ¼ of the S. E. ¼ section 1, township 18, range 3 west.

To the 6th cross-interrogatory he saith: The spring over which

Dr. Hawkins and Joab Bagley had a dispute is conceded now as being on the Dr. Hawkins place.

his
GEOARGE x MASSEY.
mark.

209 *To Ephraim Murphy.*

Int. 1. Do you know the land described as the S. E. ¼ of S. E. ¼, section 1, township 18, range 3 west, in Jefferson county, Alabama? If yea, state if you ever cleared and cultivated any portion of it, and state the particular portion and from whom you got permission to so clear and cultivate; state fully. Give the year, if you can, and how long you continued to cultivate said land.

Ephraim Murphy, to 1st interrogatory, answers: I know the land described as the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, in Jefferson county, Alabama. About 1875 or 1876 I went to Mr. James Thomas, superintendent of the Jefferson Iron Company, at Irondale, Ala., and got his permission to clear a part of the said land. He told me to go ahead and clear as much as I wanted of the land and take care of it for the Jeffe-son Iron Company. I cleared and cultivated about four acres. The first year I cleared and fenced it, and then I made two crops on it. I cleared about four acres in the N. E. corner of said forty acres. I lived on section six, just east of said forty acres, and extended my fence so as to take the four acres. I cleared in my field and the entire field was under one fence.

Int. 2. State how far the place was where you lived from said forty acres, if you say you did clear and cultivate a portion of it, and will you please state what was the general and common understanding in the neighborhood as to the ownership of this land; in other words, to whom did the neighbors say this forty-acre tract belonged? How long did you live in this neighborhood?

To the 2nd interrogatory he saith: I lived about 400 feet from the forty acres before mentioned. I lived in section 6, which is just east of said forty acres. The general and common understanding
210 in the neighborhood was that the said forty-acre tract was the property of and belonged to the Jefferson Iron Company. I lived in that neighborhood about seven years.

Cross-Interrogatories to be Propounded to Ephraim Murphy.

Cross-int. 1. If you say you know the S. E. ¼ of the S. E. ¼ section 1, township 18, range 3 west, please state if it is not a fact that you never lived upon or cultivated any of said land, but, on the contrary, that you resided and cultivated land situate in section 6, township 18, range 3 west. State further if the lines of the land you lived upon and cultivated in section 6, township 18, range 2 west, were not run out about the time you went to live on said land by H. L. Wheeler, the then county surveyor for Jefferson county, and if you did not rent the said land in section 1, township 18, range 2 west, from the said Wheeler.

To the 1st cross-interrogatory he saith: It is a fact that I lived in section 6, township 18, range 2 west, and cultivated land in said

section, and also cultivated land in the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, which was under the same fence and in the same field as in land in section 6, township 18 S., range 2 west, upon which I lived. Mr. H. L. Wheeler did run out the line in section 6, township 18 S., range 2 west, from said Wheeler. H. L. Wheeler wanted me to pay rent for land I occupied in section 6, township 18 S., range 2 west, but I refused to do it, not knowing his authority. Afterwards I saw Mr. Hillman, the owner of the land I occupied in section 6, township 18 S., range 2 west, in regard to occupying said land.

EPHRAIM MURPHY.

Attest: J. P. STYLES.

211 *To James E. Hawkins.*

Int. 1. Have you any knowledge or acquaintance with the land known and described as the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west? If yea, state how you came to this knowledge and whether your business required you to go on or near this land. State fully.

James E. Hawkins, to 1st interrogatory, saith: I have a knowledge and an acquaintance with the land mentioned as the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west. My father owned a tract of land adjoining this known as the S. ½ of the N. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼, section 1, township 18, range 3 west. After, between the years 1871 and 1874, I visited the last-named land with a view of buying and living there, and subsequently, as agent for my father, I frequently visited these and adjoining lands, looking after it, up to 1877. After that, until 1879, as executor of my father, I had charge of the last-named land and frequently visited it and adjoining tracts, showing it to parties applying to purchase and pointed out the lines between the land owned by my father and the land in controversy.

Int. 2. Do you know anything of the purchase of the land by Joab Bagley of the Alabama & Chattanooga Railroad Company in 1870 and 1871? If yea, state all you may know and especially any acts of Joab Bagley showing ownership of said forty-acre tract and as to any claim to a certain spring. State fully.

To 2nd interrogatory he saith: About the time that I began visiting the land of my father I knew that Joab Bagley claimed the land mentioned in interrogatory 1st as the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and that he bought it from the Alabama & Chattanooga Railroad Company. I knew him to claim the land and often visited it, and he employed a surveyor to trace out the line between this land and the land owned by my father to
212 determine the location of a certain spring near the north line of forty acres in controversy in this suit, and they finally, in order to settle the location of the spring, agreed to submit it to a surveyor employed by each of them, and W. P. Barker was agreed on, and, according to his survey, the spring was located on my father's land. After that Joab Bagley continued to claim the forty acres in controversy, but laid no claim to the spring.

Int. 3. Were you called upon to go out to or near this land often during 1875 and until 1878 and 1879? If yea, state how often.

To 3rd interrogatory he saith: This question has been fully answered in first answer.

Int. 4. Do you know anything of the sale of this forty-acre tract by Joab Bagley? And to whom did the people in the neighborhood ascribe ownership of said tract if you say Joab Bagley sold it? State fully all you may know on this point.

To 4th interrogatory he saith: It was the common talk of the people in the neighborhood and at Elyton, near the said land, that Bagley had sold said forty-acre tract to some Pennsylvania men, who formed the Jefferson Iron Company and who built a furnace at Irondale. The negroes who were living on section 6, township 18, range 2 west, were cultivating a part of the land in controversy and said they were tenants of the Jefferson Iron Company as to all land they were using in the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and that the land belonged to the Jefferson Iron Company.

Int. 5. State any other fact or circumstance in your knowledge that will benefit the complainant.

—. ——.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

Cross-Interrogatories to be Propounded to James E. Hawkins.

213 Cross-int. 1. If you state that you know the lines of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, state if it is not a fact that there is a large spring situated on what was known as the Hawkins tract, but within a short distance of the corner of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west.

To 1st cross-interrogatory he saith: There was a large spring on the Hawkins tract, near the N. W. corner of the forty acres mentioned in cross-interrogatory 1st, which said spring was never in controversy, but was always conceded as being on the Hawkins tract. The spring over which there was a controversy was near the N. E. corner of said forty acres and about six feet north of the north line of said forty acres.

JAMES E. HAWKINS.

On the foregoing deposition is endorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

In Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JNO. A. BILLUPS *et al.*

Interrogatories to be Propounded to L. H. Scruggs, who Resides at Huntsville, Ala., Witness for the Complainant.

Deposition of L. H. Scruggs, a witness sworn and examined under and by virtue of the written agreement of counsel hereto annexed in a certain cause pending in the chancery court of Jefferson county, Alabama, wherein D. B. Miller is complainant and John Swann and John A. Billups *et al.* are defendants.

The said L. H. SCRUGGS, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

Int. 1. Where do you reside and how long have you so resided?

214 Answer 1. To the 1st interrogatory he saith: I reside in Huntsville, Alabama, and have lived there about twenty-five years.

Int. 2. Did you ever have anything to do in the matter of the division of the lands overlapping in the districts donated by Congress of the United States to the State of Alabama between the Alabama & Chattanooga Railroad Company and the South & North Railroad Company? If yea, state the character of your connection and from whom you received your authority, and attach copy or copies of same or the original if you are willing to do so. If you have not got the originals or a copy or copies will you please state whether you have made careful search for same? If you cannot find it please state the contents, as near as you can, and by whom it was signed and the date, as near as you can remember.

To 2nd interrogatory he saith: I did have something to do with the matter of the division of the lands on the overlapping districts donated by Congress of the United States to the State of Alabama between the Alabama & Chattanooga Railroad Company and the South & North Alabama Railroad Company. I was appointed as one of the commissioners to divide said lands and received my authority from the governor of the State of Alabama. I have not the original or a copy of the commission issued to me by said governor. I have made careful search for the same and cannot find it. The commission stated that I was appointed for the purpose of dividing said lands between the Alabama & Chattanooga Railroad Company and the South & North Alabama Railroad Company. I cannot remember the exact wording of it. Said commission was issued, I think, in December, 1873, and was signed by David P. Lewis, as governor, and Neander H. Rice, as secretary, of the State of Alabama.

Int. 3. If you say, in answer to last interrogatory, that you had some connection with this matter and that you acted by authority,

give the name of the person or persons with whom you acted
215 and the time, as near as you can, and state what you did and whether or not you put your work in writing; and, if so, what became of it.

To 3rd interrogatory he saith: I acted in conjunction with W. H. Crenshaw, who was also one of the commissioners appointed by said governor to divide said lands. We divided the lands, as nearly as I can remember, in January, 1874. The work was put in writing and deposited with the secretary of the State of Alabama.

Int. 4. Have you had occasion lately to examine any lists of lands set apart to Alabama & Chattanooga Railroad Company by commissioner appointed under the laws of the State of Alabama in the office of the secretary of state? If yea, state when you examined said list and state particularly whether you examined the list on page 25. Are you acquainted with the signature of W. H. Crenshaw? And state whether or not his signature thereto is genuine and whether your signature to said list is your genuine signature and whether you and the said W. H. Crenshaw affixed your signatures to said lists by authority, and, if so, by what authority. State particularly and fully. Now, examine the certified list here shown you by the commissioner and state whether you compared it with the original in the office of secretary of state and whether it is a true, full, and correct copy of the original; and, if so, please have the commissioner to attach it to your deposition.

To the 4th interrogatory he saith: I have had occasion lately to examine the lists of lands set apart to the Alabama & Chattanooga Railroad Company by commissioners appointed under the laws of the State of Alabama in the office of the secretary of the State of Alabama. I made said examination on or about the 31st of January, 1885. I did examine particularly the list on page 25. I am acquainted with the signature of W. H. Crenshaw, and his signature to the said list on page 25, as well as my own signature thereto, is genuine, and our signatures to said lists were affixed
216 thereto under and by virtue of the authority vested in us by said commission. I have now examined the certified list shown me by the commissioner and state that I have compared it with the original in the office of secretary of the State of Alabama and it is a full, true, and correct copy of the original, and I hereby make the same a part of my deposition, placing my initials, "L. H. S.," thereon as a mark of my identification.

Int. 5. And if, in answer to foregoing, you say you examined certain lists of lands, &c., please state if you examined the list on page 26; and, if yea, state particularly as to the signatures and genuineness of said list, and after you have answered particularly on this point please examine the certified list here shown you by the commissioner and state whether you compared it with the original in the office of secretary of state and whether it is a true and correct copy of the original; and, if so, have the commissioners to attach it to your deposition.

To the 5th interrogatory he saith: I did examine particularly list on page 26, and said list and the signatures thereto are genuine. I

have compared the certified copy of said list on page 26, which copy is now shown me by the commissioner, and I state that it is a full, true, and correct copy of the original, and I hereby attach the same to my deposition, placing my initials thereon as a mark of identification, viz., "L. H. S."

Int. 6. Please state anything else you may know going to show that the N. W. ¼ of section 5, township 18 S., range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, was set apart by authority of the State of Alabama to the Alabama & Chattanooga Railroad Company and the time when.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

217 To 6th interrogatory he saith: I know nothing else going to show that the land described in interrogatory 6 was set apart by authority of the State of Alabama to the Alabama & Chattanooga Railroad Company than what I have already stated. The time when and the manner in which said lands were so set apaprt I have fully detailed in my foregoing answers.

L. H. SCRUGGS.

The name of John H. Sheffey, who resides at Huntsville, Ala., is suggested as a suitable commissioner to take the deposition of the above-named witness.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

I consent that John H. Sheffey may act as commissioner to take deposition of the above-mentioned witness with or without commission.

Jan. 31st, 1885.

SAMUEL F. RICE,
Sol. for said Swann & Billups.

We agree to above.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.
ELLIS PHELAN, *Per Se.*

I, John H. Sheffey, the commissioner named in the annexed agreement of counsel, hereby certify that the evidence of the witness, L. H. Scruggs, under oath was written down by me and subscribed by him in my presence, at my office, in the city of Huntsville, Alabama, on the 7th day of February, 1885, and that I have a personal knowledge of the personal identity of said witness, and that I am not of counsel or kin to any of parties to the cause or in any manner interested in the result thereof.

218 Given under my hand and seal this 7th day of February, 1885.

JOHN H. SHEFFEY,
Commissioner.

Commissioner's fee for taking this deposition, $10.00.

JOHN H. SHEFFEY,
Commissioner.

EXHIBIT # 1 TO L. H. SCRUGGS' DEPOSITION, SUPRA.

Lands Set Apart to Alabama & Chattanooga Railroad Company by Commissioners Appointed under the Laws of the State of Alabama.

Parts of section.	Sec.	Tp.	Range.	Land dist.	Acres.	Rate.	Value.
N ½, n ½ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	1	18	2 W.	Montgomery.	520	3 50	1,820 00
E ½, s ½ of s w ¼	3	"	"	"	400	2 50	1,000 00
S e ¼ of n w ¼, n ½ of n e ¼, s w ¼ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼	5	"	"	"	320	20 00	6,400 00
W ½ of n e ¼, n ½ of n w ¼, s e ¼	7	"	"	"	320	15 00	4,800 00
N ½ of n w ¼, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	17	"	"	"	360	2 50	900 00
219							
E ½, e ½ of n w ¼, e ½ of s w ¼	19	18	2 W.	Montgomery.	480	2 50	1,200 00
N w ¼ of n e ¼, e ½ of n w ¼, n w ¼ of n w ¼, e ½ of s e ¼, s w ¼ of s e ¼, w ½ of s w ¼	25	"	"	"	360	4 00	1,440 00
E ½ of n e ¼, n w ¼ of n e ¼, n ½ of n w ¼, e ½ of s e ¼, s w ¼ of s w ¼	29	"	"	"	320	2 50	800 00
W ½ of n e ¼, w ½ of s e ¼, w ½	33	"	"	"	480	4 00	1,920 00
					3,560		20,280 00

We, the undersigned commissioners, appointed under and by virtue of the laws of the State of Alabama to divide the lands in conflict between Alabama & Chattanooga and South & North Alabama railroads, granted to the State of Alabama by the Congress of the United States to aid in the construction of said railroads, do hereby set apart and appropriate the above-designated lands to the said Alabama & Chattanooga Railroad Company as their proportion of lands in the above-named township.

220 Witness our hands this 28th day of January, A. D. 1874.

W. H. CRENSHAW &
L. H. SCRUGGS,
Commissioners.

Witness-:
THOMAS B. MADDOX.
K. M. CUNNINGHAM.

On the foregoing exhibit is endorsed the following: Exhibit # 1 to L. H. Scruggs' deposition. John H. Sheffey, commissioner.

EXHIBIT # 2 TO L. H. SCRUGGS' DEPOSITION.

Lands Set Apart to Alabama & Chattanooga Railroad Company by Commissioners Appointed under the Laws of the State of Alabama.

Parts of section.	Sec.	Tp.	Range.	Land dist.	Acres.	Rate.	Value.
S e ¼ of s e ¼	1	18	3 W.	Montgomery.	40	20 00	800 00
S e ¼ of n e ¼, n w ¼ of the s w ¼	21	"	"	"	80	40 00	3,200 00
N ½ of the n e ¼, s w ¼ of n e ¼, e ½ of n w ¼	29	"	"	"	200	40 00	8,000 00
N w ¼ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, w ½ of s w ¼	31	"	"	"	240	20 00	4,800 00
					560		16,800 00

221 We, the undersigned commissioners, appointed under and by virtue of the laws of the State of Alabama to divide the lands in conflict between Alabama & Chattanooga and South & North Alabama railroads, granted to the State of Alabama by the Congress of the United States to aid in the construction of said railroads, do hereby set apart and appropriate the above-described lands to the said Alabama & Chattanooga Railroad Company as their proportion of lands in the above-named township.

Witness our hands this 28th day of January, A. D. 1874.

W. H. CRENSHAW,
L. H. SCRUGGS,
Commissioners.

Witness-:
THOMAS B. MADDOX.
K. M. CUNNINGHAM.

On the foregoing exhibit is endorsed the following: Exhibit # 2 to Scruggs' deposition. John H. Sheffey, commissioner.

OFFICE OF SECRETARY OF STATE,
MONTGOMERY, ALA., *January 30th*, 1885.

I hereby certify that the foregoing two pages contain full, true, and correct copies of certain original lists (and found on pages 25 and 26) of lands set apart by commissioners to Alabama & Chattanooga Railroad Company as the same are on file in my office, and that said lists contain all the lands so set apart in the township named.

Witness my hand and the great seal of State the year and date above written.

ELLIS PHELAN,
Secretary of State.

On the foregoing deposition is endorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

222 In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

Interrogatories to be Propounded to W. F. Hanby, Witness for the Complainant, who Resides at Oxmoor, Alabama.

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, I, the commissioner therein named, have called and caused to come *to come* before me, the said W. F. Hanby, the witness named in said commission, on this 14th day of February, 1885, at my office, in the city of Birmingham, and, having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, W. F. HANBY, the said witness, deposes and saith as follows:

Int. 1. Where do you reside, and how long have you so resided?

To 1st interrogatory he saith: I reside at Oxmoor, and have resided there since May, 1876.

Int. 2. During years from 1873 to 1880 were you at any time employed by the Jefferson Iron Company? If yea, in what capacity and what were your duties? State fully, and please state the year or years you were so employed.

To 2nd interrogatory he saith: In the year 1872 I was employed by the Jefferson Iron Company and remained in its employ until 1876, with one or two vacations, which vacations were not longer than five months. It was my duty to run the lines to the land owned by the Jefferson Iron Company and to inspect the wood that was used in making charcoal for said company and to inspect the iron-ore land. I was employed by the Jefferson Iron Company for

the purposes I have stated about eighteen months, beginning in 1872 and ending in the winter of 1873.

Int. 3. Do you know anything of the N. W. ¼ of section 5, township 18, of range 2 west, and of the S. E. ¼ of S. E. ¼ of section
223 1, township 18, range 3 west, Jefferson county, Alabama? If yea, state all you may know in regard to said tracts of lands as to location, quality, whether mountainous or level. In what did the chief value consist?

To 3rd interrogatory he saith: I am acquainted with the N. W. ¼ of section 3, township 18, range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, in Jefferson county, Alabama. In the spring of 1875 I run the lines to the said land for the Jefferson Iron Company. There was a dispute between the Jefferson Iron Company and Joab Bagley about the title, and said Bagley went with and showed me the corners. This was after Joab Bagley had sold to the Jefferson Iron Company. The N. W. ¼ of section 5, township 18, range 2 west, is just south of east of Birmingham, about one and a half miles from Birmingham, on what is known as Red mountain, and is what I term poor land in regard to soil as tillable land; but it was thought at first to be rich in iron ore, but, after investigation, it *not* turned out to be not near so valuable. Its chief value consists in its iron ore. It is mountainous. The S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, is from a mile and a half to two miles south of Birmingham and is partly on Red mountain, lying mostly on the north side of said mountain.

Int. 4. Do you know anything of the Jefferson Iron Company claiming to own said lands during the years from 1873 to 1880? If yea, state all you know in regard to it, and state whether or not said company was in possession of said tracts of land during the years from 1873 to 1880, and state particularly the character of the possession. Give facts as fully as you can.

To 4th interrogatory he saith: I know that the Jefferson Iron Company claim- said lands from 1873 to 1879 or 1880; I do
224 not remember which. The Jefferson Iron Company paid the taxes on the land, for I made out the list of land said company paid tax on, and the land mentioned as the N. W. ¼ of section 5, township 18, range 2 west, and S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, was put in the list. I stated that the Jefferson Iron Company claimed said land until 1879 or 1880. I did not know which, because in 1879 or 1880 said land was sold under a mortgage executed by the Jefferson Iron Company, and D. B. Miller became the purchaser. The Jefferson Iron Company was in possession of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, from 1873 to 1879 or 1880. It was recognized as the land of the Jefferson Iron Company and they paid taxes on it, and there was, to the best of my recollection, when I run the lines in 1873, a small box house on it and a little spot in the N. E. corner. There was a negro living in the house, but I do not recollect his name. When I was running the line I told him he would have to get permission from the Jefferson Iron Company to live there, and he said he would. As to the N. W. ¼ of section 5, township 18, range 2

west, there was a man living on it by the name of O'Barr when I run the lines for the Jefferson Iron Company. He said Mr. Joab Bagley also claimed the land. I do not know how long O'Barr lived upon the land. I do not know anything more about the possession of the Jefferson Iron Company of the land mentioned than I have already stated.

Int. 5. Were you ever employed by said Jefferson Iron Company during said year to look after and survey any of its lands? If yea, please state whether or not you made a survey of said tracts of land above described, viz., the N. W. ¼ of section 5, township 18, range 2 W., and the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 W., for said company. If yea, state the time, as near as you can, and what you did to mark or designate the boundaries. State fully and particularly, only giving facts.

225 To 5th interrogatory he saith: As I have already stated, I was employed by the Jefferson Iron Company during the years I have mentioned to look after lands, among other things. I did not make the survey of said tracts of land in controversy in the spring of 1873. The corner-stones had already been placed by the county surveyor, and I only blazed the trees to show the place the lines run.

Int. 6. Please state what experience, if any, you have had in surveying and running out the lines of lands in Jefferson county, Alabama, and whether or not the boundaries or lines around the N.W. ¼ of section 5, township 18, range 2 west, were plainly marked and designated, and the same as to the lines around the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west. If yea, state the kind and character of marks used.

To 6th interrogatory he saith: I have been surveying lands and running out lines of the lands in Jefferson county, Alabama, for about twenty years. The old U. S. section line on the north and west side of section 5, township 18, range 2 west, was plain. The other lines around the said section 5, township 18, range 2 west, were plain, but were made by the county surveyor and were plainly marked and designated. The lines around the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 W., were also plainly marked and designated. The marks were made on trees by blazing and hacking and could be easily found.

Int. 7. State anything else you may know that will benefit the complainant as if you were especially interrogated thereto.

WATTS & SON AND O. W. UNDERWOOD,
Sol's for Complainant.

To the 7th interrogatory he saith: I have stated about all I know.

W. F. HANBY.

We suggest the names of E. L. Clarkson and J. P. Stiles,
226 both of whom reside at Birmingham, Alabama, as suitable commissioners to take the deposition of W. F. Hanby.

WATTS & SON AND O. W. UNDERWOOD.
For Complainant.

I, J. P. Stiles, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by me in the words of the witness, W. F. Hanby, were read over to him and he assented, swore to, and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of said witness; that I am not of counsel or kin to either of the parties to said cause or interested in the event thereof, and I enclose the said testimony, together with said commission and interrogatories, direct- to the said register in chancery, whence the same emanated, as my full execution of said commission.

Given under my hand and seal this the 14th day of February, 1885.

J. P. STILES. [L. S.]

Commissioner's fee, $2.50.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To J. P. Stiles, Esq., of Birmingham, Alabama, in the State of Alabama, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories hereunto attached of W. F. Hanby, a material witness for the complainant in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and John Swann
227 and John A. Billups and others defendants; and we do hereby authorize and empower you, the said commissioners, to call and cause to come before you the witness at such time and place as you shall appoint and his deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition when so taken by you shall be subscribed by said witness, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us under your hands and seals in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 10th day of February, A. D. 1885.

E. L. CLARKSON, *Register.*

STATE OF ALABAMA, }
Jefferson County. }

I, M. T. Porter, judge of probate court in and fo- the said county and State, hereby certify that the pages hereto attached and numbered from 1 to 10, inclusive, contain full, true, and correct copies of the report of Jas. Olvercy and the decree of the probate court

therein; also the petition for the sale of the real estate in the matter of the estate of Joab Bagley, deceased, as the same are of record and on file in my office.

Witness my hand this 20th day of May, 1885.

M. T. PORTER,
Judge of Probate.

228 *Report of Insolvency.*

THE STATE OF ALABAMA, }
Jefferson County. }

Probate Court.

The undersigned, William J. Eubank, administrator of the estate of Joab Bagley, deceased, respectfully represents and reports to your honor that the said estate, according to the best of his knowledge and belief, is insolvent, and the undersigned herewith files the three following statements, to wit, the first marked "Statement A," which contains a full statement of all the goods and chattels, evidences of debt, and other personal property, with the estimated value of each and the amount of money belonging to the said estate. The second marked "Statement B," which is a full statement of the real property of the deceased or of any interest therein, the local situation of such property and the estimated value thereof. The third, marked "Statement C," is a full statement of the claims against the estate which have come to the knowledge of the undersigned, the character and amount of each claim, and the same and residence of each creditor, as far as known.

Statement A.

Balance cash on hand at last annual settlement	$868 90
Promissory note, Samuel and Moses Filed, due Nov. 18th, 1872	125 00
Promissory note, T. Cummins, due Nov. 18th, 1872	220 00
" Geo. S. Coxe, ½ April 21st, 1872, and ½ (Doubtful.) April 21st, 1873	73 00
Promissory note for $1,302.00, with the following credits: $700, $25.00, $50,00, and $100.00	427 00
Promissory note, B. J. C. Hale, due Oct. 28th, 1873 (insolvent)	150 00
Promissory note, John Hemphill, due Sept. 5th, 1878 (insolvent)	14 91
229 Promissory note, W. F. Tegner, due Nov. 15th, 1873	4 50
" H. A. McDanal, February 20th, 1874	46 00
Promissory note, C. W. & C. A. Hughes, Dec. 30th, 1872	55 00
" W. J. Laney, March 6th, 1874	18 00

Statement B.

Part of the N. W. ¼ section —, township 18, range 3 west, — acres, with S. W. ¼ of the S. W. ¼ section 1, township 16, range 5 west; S. W. ¼ of S. E. ¼ and N. E. ¼ of S. E. ¼ and E. ½ of S. W. ¼ section 31, township 16, range 3 west; W. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ and N. W. ¼ of S. W. ¼ section 5, township 18, range 2 west, and S. W. ¼ of S. W. ¼ section 5, township 18, range 2 west.

Town lots in Elyton, in said county: Lot 69, 70, 71, and 72; part of 68.

Lot in the city of Birmingham, in said county, viz: Lot # 2 on west side of Twenty-first street, fronting twenty feet on said street and running back of uniform width one hundred feet.

Statement C.

Name of creditor.	Residence of creditor.	Character of claim.	Am't claim.
Hawkins & Earle	Elyton, said county	Account	$44 56
P. H. Earle	" " "	"	59 85
Washington Bagley	Jefferson county, Ala.	Promissory note	125 00
Margaret Hudson, adm'x of R. Hudson.	" " "	Note (credit $115)	275 00
Margaret Hudson, adm'x of R. Hudson.	" " "	" (credit $211.00)	525 00
Jackson Montgomery	B'ham, Ala.	"	148 00
Thomas Smith	Jefferson county, Ala.	"	100 90
230			
J. B. Earle & Co.	Elyton, Alabama	Account	41 95
" " "	" "	"	20 55
" " "	" "	"	88 49
C. L. McMillan	" "	"	32 64
R. N. Green	" "	Note	15 00
J. R. Smith	" "	Account	153 35
Munus Bagley	" "	"	138 00
Charles Neuman	Birmingham, Ala.	"	12 00
J. B. Vann	Elyton, Ala.	"	17 25
S. L. Robertson	Birmingham, Ala.	"	52 00
Jefferson Co.	Jefferson county, Ala.	Claim for damages	3,400 00
Ala. & Chatta. R. R. Co.	Depot in Birmingham, Ala.	6 notes, aggregatory	375 00

And he therefore prays that said estate may be declared insolvent.

WILLIAM J. EUBANK.

THE STATE OF ALABAMA, *Jefferson County.*

Probate Court.

Personally appeared before me, John C. Morrow, judge of probate, —— ——, who, being sworn, says that the facts stated in the foregoing petition and in three several statements therewith filed are correct and true to the best of his knowledge, information, and belief.

WILLIAM J. EUBANK.

Sworn to and subscribed before me this 18th day of April, A. D. 1877.

JOHN C. MORROW,
Judge of Probate.

231 *Joab Bagley, Estate of. June 9th*, 1877. *Decree of Insolvency.*

This day having been regularly appointed by the judge of the court to hear and determine upon the report and statement of the insolvency of said estate which was heretofore filed by William J. Eubank, the administrator thereof, now comes the said administrator and moves the court that said estate be declared insolvent in accordance with said reports and statements, and the court being satisfied from due examination and proof that notice of the filing of said report and of the day set to hear and determine upon the same has been given to the creditors of said estate, as required by law and in all respects as directed by order of the court entered in the premises on the 19th day of April, 1877, thereupon the court proceeds to hear and determine as to said report; and now, none of the creditors of said estate contesting the correctness of said report, it is ordered, adjudged, and decreed that said estate be, and the same is hereby, declared insolvent. It is further ordered that the said William J. Eubank do file the amounts, vouchers, and evidences within thirty days from this date for a settlement of his past administration of said estate, and that the 20th day of June, 1877, be appointed as the day to make said settlements; that the creditors of said estate be notified of the order and decree and of the time set for making said settlement by forwarding notices to them thirty days before said day of hearing, by posting notices at the court-house door for same length of time, and by publication once a week for same length of time in Jefferson Independent, paper published in said county.

232 *Petition for Sale of Real Estate.*

STATE OF ALABAMA, }
Jefferson County. }

Probate Court.

To Hon. John C. Morrow, judge of probate court, Jefferson county:

The undersigned, William J. Eubank, your petitioner, by appointment of this court administrator of the estate of John Bagley, deceased, respectfully represents unto your honor that all the personal property by law reserved to the widow and children, so far as the same has come to his knowledge, has been sold pursuant to an order of this court, as will appear from the report of said sale heretofore filed by your petitioner, and the proceeds thereof, together with all other moneys belonging to said estate, are insufficient for the payment of the debts of said estate and the lawful costs and charges of administration, as by accounts and vouchers in file will more particularly appear; that all the personal property and assets of the said

estate remaining in the hands of your petitioner are mentioned in the schedule hereunto annexed and made a part of this petition for reference and evidence and marked "Exhibit A," amounting to $1,429.19, of which your petitioner will probably collect the sum of $350.00, besides the cash on hand; that the claims against said estate already legally presented amount to $5,624.64, besides interest, as will more fully appear from the schedule herewith attached and made a part of this petition for reference and evidence and marked "Exhibit B," which claims to the amount, at least, of $1,900.00, besides interest, your petitioner believes to be just and valid. Your petitioner therefore respectfully represents that the personal property of said estate is insufficient to pay the debts, and that said estate has been declared insolvent by this court, and that therefore it is necessary and will be to the interest of the said estate that the lands hereinafter mentioned, the same being all of the
233 real estate of which the said deceased died seized, except what is exempt for said widow and children, which lands are described as follows, to wit: About two acres in the S. W. corner of S. E. ¼ of N. W. ¼ of section 6, township 18, range 2 west; the S. W. ¼ of S. W. ¼, section 1, township 16, range 5 west; the W. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ and N. W. ¼ of S. W. ¼, section 5, township 18, range 2 west; the S. W. ¼ of S. W. ¼, section 5, township 18, range 2 west; a lot in the city of Birmingham, described as follows, to wit: N. ½ of lot # 2, on west side of Twenty-first street, fronting twenty feet on said street and running back of uniform width one hundred feet; the S. E. ¼ of section 7, township 18, range 2 west; the following-described lot in the town of Elyton, to wit: So much of lots Nos. 65, '6, '7, '8, '9, 70, 71, and 72 as are between the female institute lot on the east and the lot on which the Methodist church stands on the west, fronting on Main street or Georgia Road street, running back to Cotton street; upon said lot is a brick dwelling-house; also the interest of the said Bagley in the said Methodist-church lot, being a conditional creditor; another lot in said town of Elyton, containing about an acre, which was improved by Thomas Cummins and upon which he now lives, fronting on Church street and on the south side of Church street; all of the foregoing-described real estate is situate in said Jefferson county; and the following-described lot of land, situated at Blount Springs, in the county of Blount, in said State of Alabama, to wit: On the N. ¼ of the N. E. ¼ of N. E ¼ of section 12, township 13, range 3 west, and more particularly described as follows: Marked on plan lot # 10 and commencing at a stake 83 feet on a corner N. 35° 15′ 3″ from a sake that is set on the west side of the present travelled road and that is 515 feet and S. 85° 30′ west from S. E. corner of said tract of land, thence N.
35° 15′ east 83 feet along the western boundary of said road
234 to a stake; thence south 85° 30′ west 264 feet to a stake on east side of a new street; thence following said street on a coarse south 45° 15′ west 99⅔ feet to a stake; thence north 85° 30′ east 286 feet to a point of beginning, containing 17,875 square feet of land; and also the following in said county of Jefferson, to be sold subject to the widow's dower, to wit: About eighteen and $\frac{65}{100}$ acres

in section 2, township 18, range 3 west, on north side of the A. & C. R. R, be sold for the purpose of paying the debts of said estate. Your petitioner further states that the names, ages, residences, and condition of the heirs and distributees of said estate are as follows, to wit: Francis M. Bagley, over 21 years of age; Alice Bagley, Mary Bagley, Joseph Bagley, William J. Bagley, Elijah B. Bagley, all minors over fourteen years of age; Bettie Montgomery, wife of R. S. Montgomery, both over twenty-one years — age. Rebecca E. Bagley is the widow of said Joab Bagley, deceased. All of said heirs and widow reside in said county of Jefferson and all of said minors with their mother, the said widow.

Wherefore, in consideration of the premises, your petitioner prays that for the purpose of paying the debts of said estate you- honor will grant an order directing your petitioner to sell the lands hereinafter described and will make such further orders herein as may be by law required and to your honorable court may seem best.

STATE OF ALABAMA, }
Jefferson County. }

William J. Eubank, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true according to the best of his knowledge and belief.

WILLIAM J. EUBANK.

Subcsribed and sworn to before me this — day of December, 1877.

——— ———,
Judge of Probate.

235 SCHEDULE A.

Balance cash on hand at final settlement on declaration of *in*solvency	$819 78
Promissory note on Samuel & Moses Fields, due Nov. 18th, 1873	125 00
Promissory note on R. J. C. Hale, due Oct. 28th, 1873 (insolvent)	150 00
Promissory note on John Hemphill, Sept. 5th, 1870 (insolvent)	14 91
Promissory note on T. Cummins, due Nov. 18th, 1873 (insolvent)	220 00
Promissory note on W. F. Tegner, Nov. 15, 1873 (insolvent)	4 50
Promissory note on H. McDonal, Feb. 20th, 1874 (insolvent)	40 00
Promissory note on C. W. & C. A. Hughes, Dec. 30th, 1872 (insolvent)	55 00
Promissory note on W. J. Lacey, March 6th, 1874 (insolvent)	
Decree against Geo. S. Coxe, doubtful fee	

EXHIBIT B.

List of Claims Against the Estate.

Hawkins & Earle		$44 50
P. H. Earle		59 85
Washington Bagley		125 00
Margaret Hudson, adm'x of R. Hudson (credit, $115)		275 00
" " (credit, $211)		525 00
Jackson Montgomery		148 00
Thomas Smith		100 00
J. B. Earle		41 00
" "		20 55
" "		88 49
C. L. McMillan		32 64
R. N. Green		15 00
J. R. Smith		153 00
Munus Bagley		138 00
236 Charles Neuman		12 07
J. B. Vann		17 25
S. L. Robertson		52 00
Jefferson Iron Company		3,400 00
A. & C. R. R. Co. note, aggregatory		375 00

As guardian *ad litem*, I deny the allegations and require proof. December 25th, 1877.

W. S. EARNEST.

On the back of said petition is endorsed the following: State of Alabama, Jefferson county. Probate court. Petition for sale of real estate to pay debts. Estate of Joab Bagley, deceased. William J. Eubank, administrator. Filed in the office of judge of probate court the 20th day of December, 1877, and the 2nd day of February, 1878, set for hearing. John C. Morrow, judge of probate.

Prayer granted, order of sale made, and petition ordered recorded this second day of February, 1878.

JOHN C. MORROW,
Judge of Probate Court.

Recorded in real estate sale, Record A, pp. 51, '2.

In Birmingham, Alabama, May Term, 1885.

MILLER
vs.
SWANN *et al.*

Agreement of Counsel.

It is agreed that on petition of W. A. C. Jones, a creditor of the Ala. & Chatta. R. R. Co., filed on the 15th day of Sept., 1871, in the U. S. court at Montgomery, Ala., sitting as a court of bankruptcy, the said Ala. & Chatta. R. R. Co. was by said court declared a bank-

rupt on the 6th day of November, 1871, and assignees of said
237 bankrupt were duly appointed, and that Fred. Wolfe is now the surviving assignee in bankruptcy of said bankrupt.

May 26th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.
SAMUEL F. RICE.

Endorsed on the foregoing agreement of counsel is the following: Filed in office this 26th day of May, 1885. E. L. Clarkson, register.

In Circuit Court, Jefferson County, Ala.

DOE *ex Dem.* THE STATE OF ALABAMA,
JOHN SWANN, JNO. A. BILLUPS
vs.
LAWSON MORROW, G. B. RANDOLPH.
} Certified Copy of Writ of Ejectment.

Be it remembered that on the 21st day of July the plaintiff sued out notice of ejectment in words and figures as follows, to wit:

STATE OF ALABAMA,
Jefferson County.

Circuit Court, Fall Term, 1881.

Richard Roe was attacked to answer Joe Doe of a plea whereof he, the said Richard Roe, with force and arms, &c., entered into the following-described lands, in said county of Jefferson, to wit, S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, with the rights, privileges, and appurtenances thereunto belonging, including the mineral and mining privileges thereon, which said land above described, with said rights, privileges, and appurtenants, the State of Alabama, by and through its duly authorized agent, the
238 governor of said State, had demised to the said John Doe for a term of fifteen years from April 10th, 1876, which is not yet expired, and ejected him from his lands, and also wherefore the said Richard Roe, with force and arms, &c., entered into certain other lands of the following description in said county of Jefferson, to wit, S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, with the right, privileges, and appurtenances thereunto belonging, including the mineral and mining privileges thereon, which lands above described, with the said right, privileges, and appurtenances, John A. Billups, a trustee duly appointed by the governor of Alabama in pursuance of an act of the General Assembly of said State approved February 23d, 1876, entitled "An act to ratify and confirm the settlement of the existing indebtedness of the State as proposed in the report of the commissioners appointed under the act approved December, 1874," and John Swann, the trustee appointed by the bondholders by virtue of the authority granted by said act approved

February 23d, 1876, has demised to the said John Doe for a term of fifteen years from April 10th, 1877, which is not yet expired, and granted him from his said last-mentioned lands, by virtue of which several demises the said John Doe entered into the said several lands first and secondly above mentioned, with the said right, privileges, and appurtenances, and became and was possessed thereof for the said several terms so to him thereof respectively granted aforesaid, and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the first day of January, in the year 1878, with force and arms entered into the said lands, with the appurtenances, right, and privileges, first and secondly above mentioned, to which the said John Doe was so interested in manner and for the several terms aforesaid and which are not yet expired, and
239 ejected the said John Doe from his said several lands and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe and against the peace of the State of Alabama. Wherefore the said John Doe saith that he is injured and hath sustained damage to the value of ten thousand —, and therefore he *being* his *solt*, etc.

SAMUEL F. RICE,
Plaintiff's Attorney.

Lawson Morrow, George B. Randolph:

I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned or to some part thereof, and I, being sued in this action as a casual ejector only and having no claim or title to the same part thereof, do advise you to appear at the next term of the circuit court of the State of Alabama, to be holden for Jefferson county, on the — day of ——, A. D. 1881, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment thereon to be entered against me by default and you will be turned out of possession.

Dated this 21st day of July, 1881.

Yours, &c., RICHARD ROE.

STATE OF ALABAMA, }
Jefferson County. }

I, R. C. Bradley, clerk of the circuit court in and for said county, hereby certify that the foregoing pages, numbered from 1 to 5, inclusive, contain a full, true, and perfect copy of the writ of
240 ejectment in the case of Doe *ex dem.* the State of Alabama, John Swann & John A. Billups *vs.* Lawson Morrow and George B. Randolph as the same is of record and *in full* in my office.

Witness my hand *there* the 27th day of May, 1885.

R. C. BRADLEY,
Clerk Circuit Court.

D. B. MILLER
vs.
JOHN SWANN & JNO. A. BILLUPS *et als.*

The complainant objection to the introduction as evidence in this cause of the certifie- transcript from the circuit court of Jefferson county, Alabama, in the case of Doe *ex dem.* State of Alabama, John Swann, & John A. Billups *vs.* Jno. O. Roe because it is *res inter alios acta*, this complaint not being connected with said cause in any way and having no notice thereof and he cannot be affected thereby; and the complainant objects to the introduction as evidence against him of the application purporting to have been made by Ellis Phelan, a copy of which is attached to John J. White's deposition, and what purports to be the original being attached to F. Y. Anderson's deposition, because this suit is not for the defendant Ellis Phelan; 2nd, because the testimony of said Phelan was taken in this case by the complainant, and the defendants Swann & Billups cross-examined him in regard to the application, but did not permit him to see it, and, according to established rules, the witness cannot be impeached in any such way; and complainant objects to all that portion of the testimony of F. Y. Anderson in regard to conversation with the defendant Ellis Phelan and all negotiation with him in regard to the purchase of the S. E. ¼ of S. E. ¼ section 1, township 18, range 3 west, because there is no evidence connecting the complainant with same; also objects to the testimony of George B. Randolph as to any conversation with George B. Randolph and the defendant Ellis Phelan or any transac-
241 tion or correspondence in regard to said forty acres or in regard to the house because the same is illegal and irrelevant and there is nothing to show that complainant had any connection or interest in same.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

Jefferson Circuit Court.

WINSTED
vs.
SWANN *et al.*

MAY 10TH, 1885.

Complainant objects to the record in case of Swann & Billups *vs.* Ira O'Barr, in the circuit court of Jefferson county, Alabama, as being *res inter alos acta*, illegal, and incompetent evidence. Complainant objects to deposition of J. C. Stanton in the case pending in the circuit court of Jefferson county *wherein* John Swann *et al. vs.* J. W. Curry *et al.*, taken by Commissioner Eakin, because the same is illegal, no proper predicate having been laid, and because said deposition was taken in a case to which this complainant was no party or privy.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

On the foregoing exceptions of counsel to evidence is endorsed the following: Filed in open court on this 26th day of May, 1885. E. L. Clarkson, register.

THE STATE OF ALABAMA, *Jefferson County.*

Chancery Court.

To W. H. Hunter and E. J. Smyer, Esqs., of Birmingham, in the State of Alabama, or to such one or more of you as shall act herein, Greeting:

242 Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories hereunto attached of F. Y. Anderson, a material witness for the defendants in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and Swann & Billups defendants; and we do hereby authorize and empower you, the said commissioners, to call and cause to come before you the said witness at such time and place as you shall appoint and his deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding; and the said deposition, when so taken by you, shall be subscribed by said witness and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 4th day of April, A. D. 1885.

E. L. CLARKSON, *Register.*

On the back of the foregoing commission is endorsed the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to F. Y. Anderson, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, we, the commissioners therein named,
243 have called and caused to come before us the said F. Y. Anderson, the witness named in said commission, on this the

4th day of April, 1885, at his office, in Birmingham, Alabama, and, having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth—

F. Y. ANDERSON, the said witness, deposeth and saith as follows:

Int. 1. Where do you reside and how long have you so resided?

To 1st interrogatory he saith: I reside in Birmingham, Alabama, and have so resided since April, 1880.

Int. 2. Are you acquainted with the S. E. ¼ of the S. E. ¼, section 1, township 18 S., range 3 west? And, if yea, state fully what you know about the title or titles to and ownership of said land.

To 2nd interrogatory he saith: Yes; I am acquainted with the S. E. ¼ of the S. E. ¼, section 1, township 18, range 3 west. As regards to titles and ownership of said lands, I can state that the Congress of the United States passed an act, approved June 3d, 1856, granting the public lands in the alternate odd sections to the State of Alabama for the use of and to aid in the construction of certain railroads to run to and from certain points. Said grant covered all the public lands in the odd sections for six miles on each side of said railroad under the rules of the Interior Department, at Washington; and by virtue of the act granting these lands to the State for the roads, &c., where the limits of the grant came into conflict by reason of the two roads crossing one another or otherwise the State of Alabama appointed commissioners to make a fair and equal division of the granted lands lying within said conflicting limits to each road. After Congress passed the act of June 3d, 1856, the Interior Department, at Washington, went on and made titles to most of the lands granted to the different roads except where the lands lay within the conflicting limits of two or more roads as aforesaid. The land in dispute, to wit, the S. E. ¼ of S. E. ¼ section 1, township 18, range 3 west, lies within the con-
214 flicting six-mile limits of the Alabama & Chattanooga and the South & North Alabama railroad grants. Most of the said conflicting lands were not conveyed by the U. S. Government to the State of Alabama until 1874. In the year 1874 the governor of the State of Alabama appointed W. H. Crenshaw and L. H. Scruggs commissioners to divide said conflicting lands between the Alabama & Chattanooga and the South & North Alabama railroads, and on the 28th day of January, 1874, said commissioners divided said lands, the list whereof, duly signed and witnessed, showing the lands given to the Alabama & Chattanooga Railroad Company, is hereto attached, marked "Exhibit A," and made a part of this deposition and *are* part of the muniments of titles to said land held by John Swann & John A. Billups, trustees. Whe*n* the Interior Department conveyed titles to the State in 1874 for the lands in conflict aforesaid, for some reason unknown to me the land in dispute, viz., the S. E. ¼ of the S. E. ¼, section 1, township 18, range 3 west, was left out of the list and no title given. The State commissioners, however, went on all the same, and in the division gave said tracts to the A. & C. R. R. Co. When the controversy arose over said tract

of land, in looking over the records in 1884, I discovered this fact, and on the 17th day of June, 1884, as agent of the State of Alabama, duly appointed, I selected on behalf of said State, for the use of the A. & C. R. R., said tract of land, to wit, the S. E. ¼ of the S. E. ¼, section 1, township 18, range 3 west, and on the 4th day of October, 1884, said section was approved by the Secretary of the Interior and title issued to the State of Alabama, and on the 22d day of October, 1884, was *recovered* by the State, through its governor, to Messrs. Swann & Billups, trustees, and is hereto attached, marked "Exhibit B," and made a part of this deposition. Under these titles Messrs. Swann & Billups now hold said land.

245 Int. 3. State if you know of any person or persons having leased the said S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west; and, if so, attach, if you can, said lease to your deposition. State, further, if you know of any person or persons having made an application to purchase said S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west; and, if so, whether said applicant or applicants applied to you to purchase the fee simple of said land or the surface right only, and attach, if you can, said application or applications to your deposition, and state fully all you know in reference to the same.

To 3rd interrogatory he saith: Yes; I know about a person leasing the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, through me from Messrs. Swann & Billups, trustees, and also efforts made to purchase the same. Some time in May or June, 1881, Mr. Ellis Phelan called on me at the office of Messrs. Swann & Billups, trustees, in Birmingham, and informed me that one George B. Randolph was building a house on the said S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west; that he did not want the said Randolph to get the land, but that he wanted to purchase it from Messrs. Swann & Billups, trustees, for himself, as it joined land he already owned and he needed said land for an outlet to his other land. Mr. Phelan thereupon, either that day or one or two days after, made an application by filling up and signing a blank for that purpose, agreeing to purchase from Messrs. Swann & Billups, trustees, the surface of said tract of land for 15.00 per acre. The day Mr. Phelan informed me Mr. Randolph was building on said land I sent word to Randolph to stop doing so, else he would be held liable. In answer to this notice Mr. George B. Randolph called on me, admitted being on said land, to wit, the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and stated he wanted to purchase the surface right to same from Messrs. Swann & Billups, trustees. I thereupon

246 told him that Mr. Phelan had offerred $15.00 per acre for the surface, but that the man paying the highest price would get it. Mr. Randolph thereupon made an application, offerring $20.00 per acre for said land. On June 30th, 1881, Mr. Phelan called on me again in reference to said land, and upon my telling him that Mr. Randolph had made an application, offerring $20.00 an acre for the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, he stated that he was anxious to get said land and agreed to withdraw his first application and make another one, offerring more

than Randolph had offerred. I thereupon referred him to our sub-agent, Mr. J. J. White, and he stepped in the other room and applied to purchase said land through Mr. White and signed a new application, agreeing to pay $25.00 per acre for the surface right of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west. Said application is hereto attached, marked "Exhibit C," and made a part of this deposition. On July 9th, 1881, Mr. George B. Randolph called on me to inquire about his application, and, upon my telling him that Mr. Phelan had raised his offer for the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, by agreeing to give twenty-five dollars per acre, Mr. Randolph said, as he wanted the land, he would withdraw his first offer and make a new one, which he did through Mr. White, offerring $27.50 per acre. The said application is hereto attached and marked "Exhibit D" and made a part of this deposition. Pending the decision of the trustee, John Swann, as regards said application, Mr. George B. Randolph, on July 18th, 1881, applied to me to lease the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and, in accordance with my instructions, I, as the agent of John Swann and John A. Billups, trustees, leased on behalf of said trustees said land to the said Geo. B. Randolph. Said lease is hereto attached, marked "Exhibit E," and made a part of this deposition. When Mr. Phelan and Mr. Randolph applied to me to purchase the S. E. ¼ of S. E. ¼ of
247 section 1, township 18, range 3 west, they both informed me that they did not wish to purchase the mineral interest in said land, but they only wanted the surface right.

F. Y. ANDERSON.

We agree that a commission shall issue to W. H. Hunter and E. J. Smyer with authority to them or either of them to take the deposition of F. Y. Anderson.

SAMUEL F. RICE,
Att'y for Swann & Billups.
WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

We, W. H. Hunter and E. J. Smyer, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by us in the words of the witness F. Y. Anderson were read over to him; that he assented, swore to, and subscribed the same in our presence at the time and place herein mentioned; that we have personal knowledge of the personal identity of said witness; that we are not of counsel or kin to either of the parties to said cause nor interested in the event thereof; and we enclose the said testimony, together with said commission and interrogatories, direct to the said register in chancery, whence the same emanated, as our full execution of said commission.

Given under our hands and seals this 4th day of April, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

248 EXHIBIT A.

Commissioners' Lists, A. & C. R. R. Lands.

Limits of A. & C. R. R., S. & N. & S. R. and D. R. R'ds.

78,880 acres.

13 S., 1 E.	16 S., 3 W.	18 S., 4 W.
13 S., 1 W.	" " 4 W.	" S., 5 W.
14 S., 1 E.	" " 5 W.	19 S., 2 W.
14 S., 1 W.	17 S., 1 E.	" S., 3 W.
14 S., 2 W.	" S., 1 W.	" S., 4 W.
15 S., 1 E.	" S., 2 W.	" S., 5 W.
15 S., 1 W.	" S., 3 W.	" S., 6 W.
15 S., 2 W.	" S., 4 W.	20 S., 3 W.
15 S., 3 W.	" S., 5 W.	" S., 4 W.
15 S., 4 W.	18 S., 1 W.	" S., 5 W.
16 S., 1 E.	" S., 1 W.	" S., 6 W.
16 S., 1 W.	" S., 2 W.	21 S., 5 W.
16 S., 2 W.	" S., 3 W.	

Lands Set Apart to the Alabama & Chattanooga Railroad Company Within the Conflict Between Alabama & Chattanooga and South & North Ala. Railroads by Commissioners Appointed under the Laws of the State of Alabama.

Description of land.	Sec.	Town.	Range.	Acres.
N e ¼, e ½ of n w ¼, s w ¼ of n w ¼, s e ¼ of s w ¼	7	13	1 E.	600
W ½ of n e ¼, e ½ of n w ¼, n w ¼ of n w ¼, s e ¼ of s e ¼	19	13	1 E.	240
249 N e ¼, n w ¼, w ½ of s e ¼, s w ¼	21	13	1 E.	560
W ½ of s w ¼	23	13	1 E.	80
S ½ of n e ¼, w ½ of s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	27	13	1 E.	280
E ½ of n e ¼, n w ¼ of n e ¼, s w ¼ of n e ¼, w ½ of s e ¼, s e ¼ of s e ¼, s w ¼	3	13	1 W.	440
N w ¼ of n w ¼, s ½	9	13	1 W.	360
N ½, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	17	13	1 W.	600
W ½, s e ¼	19	13	1 W.	480
N ½, e ½ of s e ¼, w ½ of s w ¼, s w ¼ of s w ¼	25	13	1 W.	520
S ½ of n e ¼, e ½ of n w ¼, s w ¼ of n w ¼, w ½ of s e ¼, s w ¼ of s e ¼, e ½ of s w ¼, n w ¼ of s w ¼	33	13	1 W.	440

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
All of section	35	13	1 W.	640
S w ¼ of n e ¼, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	5	14	1 E.	320
E ½ of n e ¼, e ½ of s e ¼, s w ¼ of s e ¼	7	14	1 E.	200
All of section	19	14	1 E.	640
N w ¼	33	14	1 E.	160
All of section	3	14	1 W.	640
W ½ of n e ¼, n w ¼, e ½ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	5	14	1 W.	440
250 E ½ of n w ¼, s w ¼ of n w ¼, s w ¼ of s w ¼	11	14	1 W.	160
E ½ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼	15	14	1 W.	240
N ½ of section	19	14	1 W.	320
W ½ of n e ¼, w ½ of section	21	14	1 W.	400
S e ¼ of n w ¼	23	14	1 W.	40
All of section	25	14	1 W.	640
E ½ of section, e ½ of n w ¼, n w ¼ of n w ¼, s w ¼	11	14	2 W.	600
All of section	15	14	2 W.	640
N w ¼ of s e ¼	23	14	2 W.	320
E ½ of n w ¼, s w ¼ of n w ¼, s ½ of *of* s e ¼, n w ¼ of s e ¼, s w ¼	25	14	2 W.	400
S w ¼ of n e ¼, s e ¼, w ½	33	14	2 W.	520
E ½ of section, e ½ of n w ¼, n w ¼ of n w ¼, s w ¼	35	14	2 W.	600
S e ¼ of n e ¼, n e ¼ of n w ¼, s w ¼ of s w ¼	5	15	1 E.	120
N ½ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, s w ¼ of s e ¼	7	15	1 E.	240
S w ¼ of n e ¼, e ½ of n w ¼, s w ¼ of n w ¼, s e ¼ of s e ¼, e ½ of s w ¼	21	15	1 E.	280
S e ¼ of s e ¼	27	15	1 E.	40
251 N e ¼, e ½ of n w ¼, s w ¼ of n w ¼, n ½ of s e ¼, s e ¼ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	29	15	1 E.	520
E ½ of s w ¼	35	15	1 E.	480
N e ¼, n ½ of s e ¼, s w ¼ of s e ¼, e ½ of s w ¼	3	15	1 W.	360
N ½, e ½ of s e ¼, s w ¼ of s e ¼, s ½ of s w ¼	7	15	1 W.	520
S w ¼ of n e ½, n ½ of s e ¼, w ½	17	15	1 W.	440
N e ¼, e ½ of n w ¼	21	15	1 W.	240
S ½ of n e ¼, e ½ of n w ½, s w ¼ of n w ¼, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	23	15	1 W.	480
E ½, e ½ of n w ¼, s w ¼ of n w ¼, s w ¼	27	15	1 W.	600

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
E ½ of section, n w ¼, n ½ of s w ¼, s e ¼ of s w ¼	13	15	2 W.	600
S ½ of n e ¼, s ½ of n w ¼, n w ¼ of n w ¼, s e ¼	17	15	2 W.	360
N e ¼, e ½ of n w ¼, n ½ of s e ¼, s e ¼ of s e ¼	19	15	2 W.	360
S ½ of n e ¼, n w ¼ of n e ¼, n w ¼, s ½	21	15	2 W.	600
S e ¼ of s e ¼	23	15	2 W.	40
S w ¼ of n e ¼	27	15	2 W.	40
All of section	29	15	2 W.	640
N ½ of s w ¼, e ½ of s e ¼	35	15	2 W.	560
252 E ½ of n e ¼, n w ¼ of n e ¼, n w ¼, e ½ of s e ¼, n w ¼ of s w ¼	31	15	2 W.	400
All of section	33	15	2 W.	640
S e ¼	9	15	3 W.	160
W ½ of n e ¼, s e ¼ of n w ¼, s w ¼ of s e ¼, s w ¼	13	15	3 W.	320
S ½ of n w ¼, n e ¼ of n e ¼, w ½ of s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	17	15	3 W.	320
All of section	19	15	3 W.	640
E ½, e ½ of n w ¼, e ½ of s w ¼	21	15	3 W.	480
E ½, n w ¼, e ½ of s w ¼, n w ¼ of s w ¼	25	15	3 W.	600
E ½, e ½ of n w ¼, s w ¼	27	15	3 W.	560
E ½ of n e ¼, s e ¼, w ½	33	15	3 W.	560
S e ¼	23	15	4 W.	160
All of section	25	15	4 W.	640
S ½	27	15	4 W.	320
E ½ of n e ¼	7	16	1 E.	80
S w ¼ of n e ¼, w ½ of s e ¼, w ½	15	16	1 E.	440
S ½ of s e ¼, s ½ of s w ¼	17	16	1 E.	160
N e ¼, s w ¼	27	16	1 E.	320
N w ¼ of n e ¼, s ½ of n e ¼, s e ¼	31	16	1 E.	280
E ½, e ½ of n w ¼, n w ¼ of s w ¼	33	16	1 E.	440
253 W ½ of n e ¼, n w ¼, e ½ of s w ¼	35	16	1 E.	320
E ½ of n e ¼, n w ¼ of n e ¼, n ½ of n w ¼	1	16	1 W.	200
S e ¼	3	16	1 W.	80
N ½ of n e ¼, w ½	11	16	1 W.	400
N e ¼ of s e ¼, w ½ of s e ¼, e ½ of s w ¼	15	16	1 W.	200
N ½ of n w ¼, s w ¼ of n w ¼	19	16	1 W.	120
S e ¼ of s e ¼	25	16	1 W.	40
N w ¼ of s w ¼	27	16	1 W.	40
N ½ of n e ½, n w ¼ of s e ¼, s w ¼ of s w ¼	31	16	1 W.	160

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
N e ¼, n e ¼ of n w ¼, s ½ of n w ¼, n e ¼ of s e ¼, w ½ of s e ¼, s w ¼	5	16	2 W.	560
All of section	7	16	2 W.	640
N e ¼, e ½ of n w ¼, s w ¼ of n w ¼, s ½	9	16	2 W.	600
E ½, n ½ of n w ¼, s e ¼ of n w ¼, s w ¼	17	16	2 W.	600
All of section	19	16	2 W.	640
E ½, e ½ of n w ¼, s w ¼	31	16	2 W.	560
W ½ of n e ¼, n w ¼, s ½	1	16	3 W.	560
E ½, n w ¼, e ½ of s w ¼	3	16	3 W.	560
All of section	7	16	3 W.	640
254 E ½ of n w ¼, n ½ of s w ¼, s w ¼ of s w ¼, e ½ of section, w ½, n w —	11	16	3 W.	600
N e ¼ of n e ¼, w ½ of n e ¼, e ½ of — w ¼, s e ¼ of s e ¼, w ½ of s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	13	16	3 W.	440
E ½, n w ¼, n ½ of s w ¼	19	16	3 W.	560
E ½ of n e ¼, s e ¼, w ½ of n w ¼, w ½ of s w ¼	27	16	3 W.	400
N e ¼ of n e ¼	33	16	3 W.	40
All of section	1	16	4 W.	640
E ½, n ½ of n w ¼, s e ¼ of n w ¼, e ½ of s w ¼	7	16	4 W.	520
N e ¼, n e ¼ of n w ¼, s w ¼ of s e ¼	15	16	4 W.	240
S w ¼ of s e ¼	11	16	5 W.	40
E ½ of s e ¼	15	16	5 W.	80
All of section	23	16	5 W.	640
N e ¼, n w ¼, n ½ of s e ¼, s w ¼	25	16	5 W.	560
E ½, n w ¼	7	17	1 E.	480
N w ¼	9	17	1 E.	160
N e ¼, n ½ of s e ¼, s w ¼ of s e ¼, w ½	19	17	1 E.	600
S e ¼ of n e ¼, n e ¼ of n w ¼, s e ¼	29	17	1 E.	240
255 N e ¼ of n e ¼, w ½ of n e ¼, s e ¼ of s e ¼, w ½ of s e ¼, w ½	33	17	1 E.	560
N e ¼ of n e ¼, w ½ of n e ¼, s e ¼ of s e ¼, w ½ of s e ¼, w ½	1	17	1 W.	560
N w ¼ of n w ¼, s w ¼ of s e ¼	5	17	1 W.	80
N w ¼, s ½	9	17	1 W.	480
E ½ of — e ¼, n w ¼ of n e ¼, e ½ of s e ¼, w ½	11	17	1 W.	520
N e ¼, s ½	19	17	1 W.	480
All of section	23	17	1 W.	640
All of section	27	17	1 W.	640
All of section	31	17	1 W.	640
E ½ of s e ¼	1	17	2 W.	80
E ½ of n w ¼, s w ¼ of n w ¼, s w ¼	13	17	2 W.	280

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
N ½ of n e ¼, s w ¼ of n e ¼, n e ¼ of n w ¼	23	17	2 W.	160
E ½ of n e ¼, s w ¼ of n e ¼, n w ¼ of s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	27	17	2 W.	280
E ½, e ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼, s e ¼	7	17	3 W.	160
W ½ of n w ¼, e ½ of n w ¼, n w ¼ of n w ¼, w ½ of s e ¼, s w ¼	17	17	3 W.	440
W ½ of s w ¼	19	17	3 W.	80
256 E ½ of n w ¼	29	17	3 W.	80
N e ¼, w ½ of n w ¼, s w ¼	7	17	4 W.	400
E ½, n e ¼ of n w ¼, s ½ of n w ¼, s w ¼	15	17	4 W.	600
E ½ of n e ¼, w ½ of n w ¼, n e ¼ of s e ¼, s ½ of s e ¼, s w ¼	17	17	4 W.	440
All of section	19	17	4 W.	640
E ½ of n e ¼, s w ¼ of n e ¼, e ½ of n w ¼, s w ¼ of n w ¼, s e ¼, n e ¼ of s w ¼, w ½ of s w ¼	21	17	4 W.	520
W ½ of n e ¼, n w ¼, s ½	29	17	4 W.	560
W ½	31	17	4 W.	320
W ½ of n w ¼, s e ¼ of n w ¼, w ½ of s e ¼, e ½ of s w ¼, n w ¼ of s w ¼	33	17	4 W.	320
N e ¼, e ½ of n w ¼, n w ¼ of n w ¼, n ½ of s e ¼, s e ¼ of s e ¼	1	17	5 W.	400
All of section	13	17	5 W.	640
E ½ of n e ¼, e ½ of s e ¼	17	17	5 W.	160
All of section	21	17	5 W.	640
All of section	25	17	5 W.	640
N ½, n ½ of s e ¼, s w ¼ of s e ¼, s w ¼ of section	27	17	5 W.	600
257 W ½ of s w ¼, s w ¼ of n w ¼	29	17	5 W.	120
All of section	35	17	5 W.	640
N ½ of n e ¼, n w ¼, s ½	5	18	1 E.	560
N e ¼, e ½ of n w ¼, s ½	17	18	1 E.	560
W ½ of n w ¼	21	18	1 E.	80
S e ¼ of s ¼	1	18	1 W.	40
N ½, w ½ of s e ¼, s w ¼	3	18	1 W.	560
All of section	7	18	1 W.	640
N ½ of n e ¼, n w ¼, s ½ of s e ¼	19	18	1 W.	320
All of section	23	18	1 W.	640
All of section	27	18	1 W.	640
W ½ of n w ¼, s w ¼	29	18	1 W.	240
N w ¼ of s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	31	18	1 W.	160
N ½, n ½ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	1	18	2 W.	520

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
E ½, s ½ of s w ¼	3	18	2 W.	400
S e ¼ of n w ¼, n ½ of n e ¼, s w ¼ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼	5	18	2 W.	320
W ½ of n e ¼, n ½ of n w ¼, s e ¼	7	18	2 W.	320
N ½ of n w ¼, s e ¼, e ½ of s w ¼, s w ¼ of s w ¼	17	18	2 W.	360
E ½, e ½ of n w ¼, e ½ of s w ¼	19	18	2 W.	480
258 N w ¼ of n e ¼, e ½ of n w ¼, n w ¼ of n w ¼, e ½ of s e ¼, s w ¼ of s e ¼, w ½ of s w ¼	25	18	2 W.	360
E ½ of n e ¼, n w ¼ of n e ¼, n ½ of n w ¼, e ½ of s e ¼, s w ¼ of s w ¼	29	18	2 W.	320
W ½ of n e ¼, w ½ of s e ¼, w ¼	33	18	2 W.	480
S e ¼ of s e ¼	1	18	3 W.	40
S w ¼ of n e ¼, n w ¼ of s w ¼	21	18	3 W.	80
N ½ of n e ¼, s w ¼ of n e ¼, e ½ of n w ¼	29	18	3 W.	200
N w ¼ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, w ½ of s w ¼	31	18	3 W.	240
S e ¼ of n w ¼, s e ¼ of s e ¼, w ½ of s e ¼, s w ¼	3	18	4 W.	320
N e ¼, e ½ of n w ¼, n w ¼ of n w ¼, n w ¼ of s e ¼, n e ¼ of s w ¼	9	18	4 W.	360
E ½ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	15	18	4 W.	360
259 E ½ of n e ¼, n ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	17	18	4 W.	360
W ½ of s e ¼, e ½ of s w ¼, n w ¼ of s w ¼	31	18	4 W.	200
S ½	35	18	4 W.	160
All of section	1	18	5 W.	640
W ½ of n e ¼, n w ¼, s e ¼, w ½ of s w ¼	7	18	5 W.	480
E ½ of s e ¼	9	18	5 W.	80
N e ¼ of the n e ¼	13	18	5 W.	40
N w ¼ of n e ¼, s ½ of n e ¼, w ½ of s e ¼, w ½	15	18	5 W.	520
S w ¼ of n e ¼, s e ¼ of n w ¼, s w ¼	17	18	5 W.	240
E ½ of n w ¼, s w ¼ of n w ¼, s ½ of section	19	18	5 W.	440
S w ¼ of n w ¼	23	18	5 W.	40
E ½, e ½ of n w ¼, s w ¼	27	18	5 W.	560
N e ¼, n e ¼ of n w ¼, e ½ of s e ¼, s e ¼ of s w ¼, w ½ of s w ¼	35	18	5 W.	400
N w ¼ of n e ¼, s ½ of n e ¼, e ½ of n w ¼, n ½ of s e ¼, n e ¼ of s w ¼	3	19	3 W.	320

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
E ½ of n e ¼, w ½ of n w ¼, e ½ of s e ¼, s w ¼ of s e ¼	9	19	3 W.	280
N e ¼ of n w ¼	13	19	3 W.	40
260 S e ¼ of s e ¼, n w ¼ of s e ¼	17	19	3 W.	80
N e ¼ of n e ¼, e ½ of s w ¼, n w ¼ of s w ¼	19	19	2 W.	160
N ½ of n e ¼, s e ¼ of n e ¼, w ½ of n w ¼, n ½ of s e ¼, s w ¼ of s e ¼, s e ¼ of s w ¼, w ½ of s w ¼	23	19	3 W.	440
N w ¼ of n w ¼, n w ¼ of s w ¼	29	19	3 W.	80
N ½ of n w ¼	1	19	4 W.	80
E ½ of s w ¼	3	19	4 W.	80
N e ¼, n w ¼ of s e ¼, s w ¼	5	19	4 W.	360
N ½ of n e ¼, e ½ of n w ¼, w ½ of s w ¼	11	19	4 W.	240
N e ¼ of n e ¼	15	19	4 W.	40
E ½ of n w ¼, s w ¼ of n w ¼	25	19	4 W.	120
All of section	3	19	5 W.	640
E ½, n w ¼, e ½ of s w ¼	9	19	5 W.	560
S w ¼ of s w ¼	15	19	5 W.	40
N w ¼ of n w ¼, s ½ of n w ¼, s e ¼ of s e ¼, n w ¼ of s w ¼	17	19	5 W.	200
N w ¼ of n e ¼, e ½ of n w ¼, s w ¼ of n w ¼, w ½ of s e ¼, s w ¼	19	19	5 W.	400
S e ¼	21	19	5 W.	160
261 W ½, n w ¼ of s e ¼	23	19	5 W.	360
N e ¼, e ½ of n w ¼, w ½ of s e ¼, s w ¼	27	19	5 W.	480
All of section	33	19	5 W.	640
N ½ of n e ¼, s w ¼ of n e ¼, e ½ of n w ¼, s w ¼ of n w ¼, s ½	1	19	6 W.	560
N e ¼ of n e ¼, s w ¼ of n e ¼, e ½ of n w ¼, n e ¼ of s e ¼, w ½ of s e ¼, w ½ of s w ¼	23	19	6 W.	360
E ½, e ½ of n w ¼	35	19	6 W.	400
N w ¼, n e ¼ of s e ¼	5	20	3 W.	200
N e ¼, s w ¼ of n w ¼, s e ¼ of s e ¼, n w ¼ of s e ¼, n e ¼ of s w ¼, s ½ of s w ¼	1	20	4 W.	400
N e ¼ of n e ¼, s ½ of n e ¼, n w ¼, s e ¼, e ½ of s w ¼, n w ¼ of s w ¼	7	20	5 W.	560
N w ¼ of n e ¼, n ½ of n w ¼, e ½ of n e ¼, s w ¼ of n e ¼	9	20	5 W.	240
W ½ of n e ¼, n e ¼ of n e ¼, n w ¼, n w ¼ of s e ¼, s e ¼ of s e ¼, n ½ of s w ¼, s w ¼ of s w ¼	13	20	5 W.	480

Exhibit A—Continued.

Description of land.	Sec.	Town.	Range.	Acres.
N ½ of n w ¼, s w ¼ of n w ¼, n w ¼ of s w ¼	17	20	5 W.	160
262 N ½ of n e ¼, s w ¼ of n e ¼, s e ¼ of s e ¼, w ½ of s e ¼, w ½	1	20	6 W.	560
N e ¼, n ½ of s e ¼, e ½ of n w ¼, n e ¼ of s w ¼	11	20	6 W.	360
S ½ of s e ¼	5	21	5 W.	80
Total acres				78,880

We, the undersigned commissioners, appointed under and by virtue of the laws of the State of Alabama to divide the lands in conflict between Alabama & Chattanooga and South & North Alabama railroads granted to the State of Alabama by the Congress of the United States to aid in the construction of said railroads, do hereby set apart and appropriate the above-designated lands to the said Alabama & Chattanooga Railroad Company as their proportion of lands in the above-named townships.

Witness our hands this 28th day of January, A. D. 1874.

W. H. CRENSHAW,
L. H. SCRUGGS,
Commissioners.

Witness-:
THOMAS B. MADDOX.
K. M. CUNNINGHAM.

EXHIBIT B.

List # 19, *Containing a Tract of Land Selected by the Alabama & Chattanooga Railroad Company, Montgomery District, Alabama.* "*Granted Limits.*

"F." 4-207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, F. C.
263 WASHINGTON, D. C., *October 7th*, 1884. W. J. D.

I, N. C. McFarlane, Commissioner of the General Land Office, do hereby certify that the annexed copy of lists numbered 19, containing a tract of land granted to the State of Alabama by the acts of Congress approved June 3d, 1856, and April 10th, 1869, "to aid in the construction of certain railroad lands in said State,"

is a true and literal exemplification of the original approved list now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLANE,
Commissioner of General Land Office.

List of lands in the district of lands subject to sale at Montgomery, Alabama, within the six-mile limits granted to the State of Alabama by the act of Congress approved June 3d, 1856, entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," being a vacant and unappropriated tract of land in the alternate sections, designated by odd numbers, for six sections in width on each side of the railroad herein named.

4–298.

South of base line and west of Huntsville principal meridian, Alabama.

Railroad List.

Tract of land within the conflicting six-mile limits of the Alabama & Chattanooga and South & North Alabama railroads.

Selection June 17, 1884. Montgomery district.

Parts of section: S. E. ¼ of S. E. ¼.
Sec.: 1.
Tp.: 18 S.
Range: 3 W.
Acres: 39.95.
Remarks: ——.

264 GENERAL LAND OFFICE, *Sept. 19th*, 1884.

I hereby certify that the foregoing list has been compared with the swamp-land records of this office and found to be free from conflict.

D. F. PIERCE,
Chief of Swamp-Land Division.

RAILROAD DIVISION, GENERAL LAND OFFICE,
September 20th, 1884.

I hereby certify that the above-described tract is found free from conflict and to inure to the State of Alabama under the acts of Congress approved June 3d, 1856, and April 10th, 1869, granting lands to said State to aid in the construction of certain railroads therein.

W. J. DRUMMOND,
Chief of Railroad Division.

(Within six-mile limits.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *September 22d*, 1884.

I, N. C. McFarlane, Commissioner of the General Land Office, do hereby certify that the foregoing on page one is a true and correct list of the tracts of lands within the six-mile limits granted to the State of Alabama by the act of Congress approved June 3d, 1856, entitled "An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State," being a vacant and unappropriated tract of land in the alternate sections, designated by odd numbers, for six sections in width on each side of the railroads named in the foregoing within the State of Alabama, covering 39.95 acres, and it is now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said acts of June 3d, 1856, and April 10th, 1869, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed,
265 at the city of Washington, on the day and year first herein above mentioned.

N. C. McFARLANE,
Commissioner.

J. K. W. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October 4th*, 1884.

Approved subject to the conditions and rights above mentioned.

F. M. TELLER, *Secretary.*

THE STATE OF ALABAMA, CHIEF EXECUTIVE'S OFFICE,
MONTGOMERY, ALA., *October 22d*, 1884.

Under the power vested in me as governor of the State of Alabama by the statutes of said State, including the act approved February 20th, 1883, entitled "An act in execution of the powers of the State of Alabama in relation to the lands granted to this State which are within fifteen miles from and on each side of the railroad known as the Alabama & Chattanooga railroad by the act of Congress of June 3d, 1856," etc., I hereby approve the written lists of land to the trustees, John Swann and John A. Billups, mentioned in said act of February 20th, 1883, and hereby assign to and vest in them, as such trustees, so far as I, as governor of the State of Alabama, am authorized by said statute to do so, and only to that extent, all the right and title in and to the within-named lands which ever belonged to the State: Provided, however, that nothing herein contained shall prejudice any right to any of said lands which the Tennessee & Coosa River Railroad Company or any other railroad company now own or claim.

In testimony whereof I have hereunto set my hand and caused

the great seal of the State to be affixed, at the capitol, in —, the day and date above written.

E. A. O'NEAL, *Governor.*

By the governor:
ELLIS PHELAN,
Secretary of State.

266 EXHIBIT C.

Alabama & Chattanooga Railroad Land Grant.

Application for land (to be sent to trustees for approval).

BIRMINGHAM, ALA., *June 30th*, 1881.

Lot or sec.: S. E. ¼ of S. E. ¼.
Block or t'p: 18 S.
Range: 3 W.
Town., county: Jefferson.
Dist. from road: 1½ miles.

Minerals reserved.

The undersigned hereby applies to purchase the above-described land.

Quantity, forty acres.		Papers to be made in name of Ellis Phelan.
Price per acre	$25 00	
Total am't for the pur.	1,000 00	Married or unmarried, ——.
Cash payment	250 00	Residence, Birmingham, Alabama.
Number of notes (three)	750 00	Post office, Birmingham, Alabama.
Am't of each note	250 00	

When due: One note in 12, one in 24, and one in 36 months, and hereby bind myself to carry out the same upon the terms as above upon the approval and the execution of a deed.

ELLIS PHELAN.

State here whatever may be of service in determining the acceptance of this application.

Rough and hilly. Lies on the side and top of Red mountain. The price offered is the full value of this land.

JNO. J. WHITE,
Land Agent.

267 EXHIBIT D.

Alabama & Chattanooga Railroad Land Grant.

Application for land, to be sent to trustees for approval.

BIRMINGHAM, ALA., *July 9th*, 1881.

Lot or sec.: S. E. ¼ of S. E. ¼.
Block or t'p: 18 S.
Range: 3 W.
Town or county: Jefferson.
Dist. — road: 1½ miles.

Minerals reserved.

The undersigned hereby applies to purchase the above-described land.

Quantity, forty acres.		Papers to be made in name of George B. Randolph.
Price per acre	$27 50	
Total am't of purchase	1,100 00	Married or unmarried, ——.
Number of notes (3)	— —	Residence, Jefferson county.
Am't of each note	275 00	Post office, Birmingham, Alabama.

When due: One note in 12, 24, or 36 months, and hereby bind myself to carry out the same upon the terms as above upon the approval of this application and execution of a deed.

G. B. RANDOLPH.

State here whatever may be of service in determining the acceptance of this application.

Rough and hilly. Lies on top of Red mountain. The price offered is the full value of this land.

JNO. J. WHITE,
Land Agent.

268 EXHIBIT E.

Land department, Alabama & Chattanooga railroad lands.

BIRMINGHAM, ALABAMA, *July 18th*, 1881.

Whereas I am the occupant of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, in Jefferson county, Alabama, a tenant of John Swann and John A. Billups, trustees, I therefore agree to pay the rent at maturity, take good care of the improvements and fences, and deliver the possession of the same and of said lands to the agent of said Swann & Billups, trustees, on or before the fifteenth day of January, 1882, or any previous day, if I fail to fulfil and keep any part of my aforesaid agreement and obligation, and any agent of said trustees for such failure shall demand possession of said lands of me.

Witness my hand and seal

G. B. RANDOLPH. [L. S.]

Attest: JNO. J. WHITE,
Third District.

$2.00. BIRMINGHAM, ALABAMA, *July 18th*, 1881.

On the fifteenth day of January, 1882, I promise to pay to John Swann & J. A. Billups, trustees, or their agent, two dollars, for value received; and, so far as this debt is concerned and in consideration thereof, I hereby expressly waive my right to have exempted to me any personal property which the constitution and laws of the State of Alabama exempt or may hereafter exempt to any resident of said State from sale on execution or other legal process of any court issued for the collection of any debt.

G. B. RANDOLPH.

269 D. B. MILLER
vs.
JNO. SWAN & JNO. A. BILLUPS, Trustees, *et al.*

By virtue of the commission hereunto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, we, the commissioners therein named, have called and caused to come before us the said Robert Goode, on the 10th day of February, 1885; M. J. Kilgore, on 11th February, 1885; Henry Morrow, on the 12th February, 1885; Richard C. Bearden, on the 12th February, 1885; W. F. Nabers, on the 13th February, 1885, and Pleasant Watkins, on the 12th day of February, 1885, the witnesses named in said commission, on the day above stated, at the office of W. H. Hunter, in Birmingham, Alabama; and, having duly cautioned and sworn said witnesses, each one, respectively, to speak the truth, the whole truth, and nothing but the truth, ROBERT GOODE, one of the witnesses, deposeth and saith as follows:

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to Robert Goode, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

Int. 1. Where do you reside and how long have you so resided?

To 1st interrogatory he saith: I reside now and have for more than twenty years resided within five miles of Birmingham, Alabama.

Int. 2. Are you acquainted with the S. E. ¼ of the S. E. ¼ of section 1, township 18 south, range 3 west; and, if so, for how long have you known said land? If you have known said land since 1870, please state if any person within your knowledge has resided upon said land between 1870 and 1881; and, if so, state name of such person or persons, if any.

270 To interrogatory 2nd he saith: I am acquainted with the land asked about in the 2nd interrogatory. I have known the land for at least forty years; nobody that I know of has resided on the said land from 1870 to 1881; if any one has resided on the said land during that time I have no personal knowledge of that fact.

Int. 3rd. State further if you are acquainted with the S. E. ¼ of S. E. ¼, section 1, township 18, range 3 west; if you have not known said land since 1871 to be railroad land.

To 3rd interrogatory he saith: I do know the land described, and it has been known since the year 1871 as railroad land.

Int. 4. Please state if you know a colored man named Ephraim Murphy; and, if so, did you not build a house for him on section 6, township 18 south, range 2 west? If yea, please give the year you

built said house and whether it was occupied by the said Murphy; and, if so, for how long and in what year or years.

To 4th interrogatory he saith: I do not know a colored man by the name of Ephraim Murphy, nor do I know any colored man named Murphy. I did not build a house for any man by name of Murphy on section 6, township 18 south, range 2 west. I built a house on said land about fifteen years ago, but I do not know that any man by the name of Murphy ever resided there.

Int. 5. State any and every other fact and circumstance within your knowledge not already stated by you which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Sol. for said Swann & Billups.

To 5th interrogatory he saith: I know nothing further.

ROBERT GOODE.

Cross-interrogatories to Robert Goode.

271 Cross-int. 1. Was it not a matter of common talk and well known in the neighborhood of this forty-acre tract that Joab Bagley purchased this tract from the Alabama & Chattanooga Railroad Company in 1870 or 1871? Did you not hear such talk frequently? Did not Joab Bagley himself tell you that he had purchased this tract from the Alabama & Chattanooga Railroad Company?

To 1st cross-interrogatory he says: I have never heard Joab Bagley's name mentioned in connection with any purchase of said land from the Alabama & Chattanooga Railroad Company in 1870 or 1871 or at any other time. Joab Bagley has never told me that he purchased said land from the Alabama & Chattanooga Railroad Company.

Cross-int. 2. Was it not a fact well known in the neighborhood in 1871 and 1872 that Joab Bagley had sold this land to some men from Pennsylvania, who rebuilt the Irondale furnace, and did you hear about said time and afterwards that the Jefferson Iron Company claimed to own said land?

To 2nd cross-interrogatory he says: I have never heard at any time that Joab Bagley had sold the said land to men from Pennsylvania, nor did I hear then or afterwards that the Jefferson Iron Company claimed to own said lands.

Cross-int. 3. Is it not a fact that you built the house in section 6 in 1869 and long before you ever saw Ephraim Murphy?

To 3rd cross-interrogatory he says: It is a fact that I built the house in section 6 about 1869, and I never have known Ephraim Murphy.

Cross-int. 4. Is it not a fact that you lived several miles from this forty-acre tract across the mountains, and that you rarely ever go by said tract, and that since 1869 or 1870 you have been by it or on it very seldom?

To 4th cross-interrogatory he saith: I now live some two miles from this forty-acre tract. It is very seldom that I go by
272 this tract. I have been by it very rarely since 1869 and 1870.

Cross-int. 5. Did you not know that Mr. James Thomas claimed this land for the Jefferson Iron Company during the year 1873 up to the time he left Irondale, in 1875 or 1876?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 5th cross-interrogatory he saith: I do not know that Mr. James Thomas claimed the said land for the Jefferson Iron Company from the year 1873 to 1881 nor did I ever hear that he claimed it.

ROBERT GOODE.

It is agreed that a commission shall issue to E. J. Smyer and W. H. Hunter, of Birmingham, with authority to either one of them to take the depositions of the foregoing witnesses, viz., Henry Morrow, W. F. Nabers, Pleasant Watkins, Mrs. M. J. Kilgore, Richard C. Bearden, and Robert Goode.

January 28th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

In Chancery Court of Jefferson County.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to Mrs. M. J. Kilgore, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

Int. 1. Where do you reside, and how long have you so resided?

Mrs. M. J. KILGORE, one of the said witnesses, deposeth and saith as follows:

To 1st interrogatory she saith: I live in Birmingham, Alabama, on Ninth avenue, South Twentieth street, and I have been living there for the last three years.

273 Int. 2. Please state if you are acquainted with the N. W. ¼ of section 5, township 18 south, range 2 west, and if you ever resided upon said land. If yea, state when you went to live on said land and when you moved off of it.

To 2nd interrogatory she saith: I am acquainted with the land described and I have lived upon the land. We moved onto this land about three years after the war closed. We moved off of this land six years ago next May.

Int. 3. If you say you are acquainted with the said N. W. ¼ of section 5, township 18 south, range 2 west, please give the name or names of any person or persons who lived upon or had possession of said land since the year 1870.

To 3rd interrogatory she saith: From the year 1870 up to about six years ago no one lived on the said land except my father's family. (My father was Ira A. O'Barr.) Since we left there and soon after we left Sam. and Sim. Winsted lived there for a short while and moved off. The house was then unoccupied. I intended to move back, but the house was burned some time after the Winsteads left it, and there has never been another house built on the place, so far as I know.

Int. 4. Please state if Ira A. O'Barr was your father and if he resided upon and held possession of the N. W. ¼ of section 5, township 18 south, range 2 west, from the year 1866 to the year 1879.

To 4th interrogatory she saith: Ira O'Barr was my father. He did reside upon and have possession of said land from about the year 1866 to the year 1879.

Int. 5. State any and every other fact and circumstance within your knowledge not already stated by you which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
For said Swann & Billups.

274 To 5th interrogatory she saith: She says she thinks of nothing further.

M. J. KILGORE.

Cross-interrogatories.

Cross-int. 1. Did you not know that the 160 acres (N. W. ¼, section 5, township 18 south, range 2 west) was claimed by the Jefferson Iron Company? Was it not general neighborhood talk that the Jefferson Iron Company owned this 160-acre tract?

To 1st cross interrogatory she saith: I did not know that the lands described in the first cross-interrogatory were claimed by the Jefferson Iron Company. I never heard it talked in the neighborhood that the Jefferson Iron Company owned this land.

Cross-int. 2. How came you to go on this land? Did you not go on it knowing that it was the property of the Jefferson Iron Company? Did you know that for several years—1874, '5, '6, and later—the Jefferson Iron Company had been trying to get Ira O'Barr off of this 160-acre tract?

To 2nd cross-interrogatory she saith: My father was entitled to the 160 acres, for he was an ex-Federal soldier and he went onto this land to settle on it for his homestead. I did not know that this land was the property of the Jefferson Iron Company. If the Jefferson Iron Company ever tried to get my father off the land I do not know that fact, but a Mr. Thomas came there and tried to hire my father to move off of the said land about 1874 or 1875. If he

was in any way connected with the Jefferson Iron Company I do not know that fact.

Cross-int. 3. How far was this 160 acres from Irondale? Did you not, while your father, Ira O'Barr, was living on this 160 acres, ask Mr. Fee Hanby, who was the agent of the Jefferson Iron Company, to look after their land, and that he told you Mr. A. Beers
275 was their agent, and that this company was the owner of this 160 acres? When did you go on the land and who gave you permission to go on it?

To 3rd cross-interrogatory she saith: I think this property is some three miles from Irondale. I don't know Mr. Fee Hanby and never had any conversation with him about this land at any time that I remember. I went on this land when my father first went on it, which time I have stated heretofore. I had no one's permission to go on this land, except my father's. I lived with him and helped to build the house on said land.

Cross-int. 4. Did you not know in 1870 and 1871 that Joab Bagley claimed to have bought this land from the Alabama & Chattanooga Railroad Company? Was it not a matter of general notoriety and neighborhood talk that Joab Bagley in 1871 sold the said land to the men who started up the Irondale furnace?

To 4th cross-interrogatory she saith: I never heard that Mr. Joab Bagley purchased this land from the Alabama & Chattanooga Railroad Company. It was not a matter of notoriety in the neighborhood, so far as I know, that Joab Bagley sold this land to the men who started up the Irondale furnace, but I did hear about that time that Mr. Bagley had sold it to Maj. Peters.

Cross-int. 5. Did you not see Joab Bagley in 1871 looking over this land and did he not tell you that he had sold it to the same Pennsylvania men who were going to start up the Irondale furnace?

To 5th cross-interrogatory she saith: I did not see Joab Bagley about the year 1871 looking over this land and he did not tell me that he had sold the land to a Pennsylvania man.

Cross-int. 6. Did not Mr. James Thomas start up the Irondale furnace in 1873 and did you not then know that this 160 acres was claimed by his company? Did not Ira O'Bar often tell you
276 that the Jefferson Iron Company was trying to get him off of this land?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 6th cross-interrogatory she saith: I don't know who started the Irondale furnace in 1873 and do not know that this land was claimed by the Jefferson Iron Company (or Irondale). I never heard my father, Ira O'Bar, say that the Jefferson Iron Company was trying to get him off of the land, except he said they were trying to buy it from him.

MRS. M. J. KILGORE.

In the Chancery Court of Jefferson County, Alabama.

MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to Henry Morrow (col.), who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

HENRY MORROW, one of the said witnesses, deposeth and saith as follows:

Int. 1. Where do you reside and how long have you so resided?

To interrogatory 1st he saith: I reside in Jefferson county, Alabama, in section 6, township 18 S., range 2 west. I have been there going on six years.

Int. 2. Are you acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west, and with the S. E. ¼ of S. E. ¼ of section 1, township 18 south, range 3 west; and, if so, how long have you known said lands?

To 2nd interrogatory he saith: I am acquainted with the N. W. ¼ of section 5, township 18 south, range 2 west, and I am acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 south, range 3 west, and I have known these lands forty or fifty years.

277 Int. 3. If you state you know said lands, please give the name or names (if any) of any person or persons who resided upon or occupied said lands since 1871, up to date, and state how said persons, if any, came to occupy said lands and how they came to leave said lands. If you are, and have been since 1871, well acquainted with said lands, please state who, if any, you have known to occupy said lands since that time. State any and everything that occurred, including what was said between you and Ellis Phelan in relation to said land and when and where the same occurred or was said.

To 3rd interrogatory he saith: The land in section 1, aforedescribed, has been occupied and resided upon by no one except Mr. George B. Randolph from the year 1871 up to the present time. The aforementioned (described) land in section 5 has been resided upon by no one that I know of except Ira O'Bar, who occupied and resided upon 160 acres of said section from 1866 up to some four or five years ago. About one year ago some parties put up houses on the said land, but who they are I do not know.

Ira O'Bar told me that he had entered an hundred and sixty acres as a homestead in section 5. This is all I know about how he came to be in possession of said land. How any of the other parties came to be in possession of any of said land, I do not know. I have stated all I know about the parties living on the said lands since 1871, except this: George B. Randolph built upon the said land in section 1 since June, 1871, and after he quit living on it he had some tenants on it. Pollie, Archie, and Amanda Brown lived in the

Randolph house and I cultivated the open land on the said tract of land after Randolph moved out of the house. In or about the month of June or July, 1883, Mr. Phelan took possession of the said property in section 1, and Mr. George Massey has been living on
278 the said property since Mr. Phelan has had it under his control. In July or August, 1883, Mr. Phelan sent for me to come to him down in the field near the house on the said land. I went down to Mr. Phelan. He asked me to sell him the crop I then had growing on the land in section 1 for thirty dollars. I refused to take it. He then told me that he did not want the crop, but wanted me to know that the property belonged to him. He wanted to give me an instrument in writing for thirty dollars for the crop if I would take that for it when it was made, but if when the crop was made I would not take the thirty dollars for it, then I was to turn this instrument in writing back to him. He then asked me to come back the next day to help do some work about the spring near the house on said place. The next day I came back and worked some about the spring. After we got through working about the spring he gave me a tin tube and told me to give it to George Massey's wife, and for her to raise the window and put it in the house. This was on Saturday, and George Massey moved into the house on the following Monday. I carried out Mr. Phelan's instructions about the tube and it was put into the house by Mrs. Massey. This is all that I now remember that occurred about said land and is in substance all that Mr. Phelan said to me about the land.

Int. 4. State if you know a person by the name of Ephraim Murphy; and, if so, please state, if within your knowledge, whether the said Murphy lived upon the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, since 1870.

To 4th interrogatory he saith: I do know a man by name of Ephraim Murphy. Ephraim Murphy never lived on the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west.

Int. 5. If you say he has not resided upon the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, since 1870, please state, if you know, in what sections, townships, and ranges the said
279 Ephraim Murphy did reside between 1870 and 1881.

To 5th interrogatory he saith: He lived in section 6, township 18 S., range 2 west, since 1870.

Int. 6. If you are acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west, and have been since 1870, please give the name or names of any person or persons who have resided upon said land since 1870, and how long said person or persons, if any, have resided upon said land.

To 6th interrogatory he saith: I am acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west, and have known it since the year 1870. Since 1870 Ira O'Bar is the only man who resided on the said land that I know of. My recollection is that Ira O'Bar, in the year 1870, was residing on the said land and continued to reside on it up to some five or six years ago.

Int. 7. State any and every other fact and circumstance within

your knowledge, not already stated by you, which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 7th interrogatory he saith: I don't know any other fact in my recollection than those already stated.

HENRY MORROW.

Attest: E. J. SMYER.

Cross-interrogatories to be Propounded to Henry Morrow.

280 Cross-int. 1. Did you know Joab Bagley in his lifetime? Do you not know that Joab Bagley bought the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, in the year- 1870 and 1871, of the Alabama & Chattanooga Railroad Company? Was it not generally known in the neighborhood and at Elyton, Ala., that Joab Bagley had purchased this forty-acre tract?

To 1st cross-interrogatory he saith: I knew Joab Bagley in his lifetime. I do not know that Joab Bagley bought the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, in 1870 or 1871, from the Alabama & Chattanooga Railroad Company. To my recollection it was not generally known in the neighborhood and at Elyton, Ala., that Joab Bagley had purchased the said forty-acre tract.

Cross-int. 2. Did you not know that it was the common understanding in the neighborhood, from 1873 to the time Ellis Phelan purchased the land in 1883, that the Jefferson Iron Company claimed to own the said forty-acre tract?

To 2nd cross-interrogatory he saith: I did not know that it was the common understanding, from 1873 to the time that Ellis Phelan purchased the land in 1883, that the Jefferson Iron Company claimed to own said land.

Cross-int. 3. Is it not a fact that you knew when you commenced to cultivate the three or four acres in said section 1, in the field enclosed in the same field with the house in section 6, that you were on the land of the Jefferson Iron Company? Did you not commence to so use and cultivate these three or four acres in the early part of 1883? Did you not so use these three or four acres without any permission from any one?

To 3rd cross-interrogatory he saith: I did not know when I commenced to cultivate the three or four acres in said section, in
281 the field enclosed in the same field with the house in section 6, that I was on the land of the Jefferson Iron Company only by what Murphy said. I did commence to use these three or four acres in the early part of the year 1883. I did use and cultivate this land without permission from any one.

Cross-int. 4. Did you not deliver up possession of the three or four acres to Ellis Phelan in the summer of 1883? Did you not tell him that you were cultivating the said three or four acres in section 1 without permission from any one, and that you had always under-

stood and it was so understood in the neighborhood that the Jefferson Iron Company owned the land (the forty acres) in section 1? Did you not further tell him, while standing in the field near the corner between section- 1 and 6, in the early part of July, 1883, that you had understood it and it was so understood in the neighborhood that the forty acres in section 1 (the S. E. ¼ of S. E. ¼, section 1, township 18 S., range 3 west) was the property of the Jefferson Iron Company, and that you knew this when you commenced cultivating the crop of 1883? Is it not a fact that you only made one crop on the three or four acres in said section 1, and that for 1883?

To 4th cross-interrogatory he saith: I did deliver up possession of the three or four acres referred to in the fall of 1883. I do not remember telling Mr. Phelan that I was cultivating the land without permission of any one. I did not tell him that I had always understood and that it was so understood in the neighborhood that the Jefferson Iron Company owned the said forty acres of land in section 1. I did not tell him, while standing in the field near the corner between section- 1 and 6, in the early part of July, 1883, that I had understood and it was so understood in the neighborhood that the forty acres in section 1 (the S. E. ¼ of the S. E. ¼, section
282 1, township 18 S., range 3 west) was the property of the Jefferson Iron Company, and that I knew this when I commenced cultivating the crop of 1883. It is a fact that I made only one crop on the three or four acres of land in section 1, and this was in the year 1883. George Massey and I started a crop on this land in 1884, but it was eaten up by stock.

Cross-int. 5. Is not the N. W. ¼ of section 5, township 18 S., range 2 west, mountainous land and known as mineral land? Is it not a fact that from 1873 to 1883 the above 160-acre tract was spoken of and known in the neighborhood as the property of the Jefferson Iron Company; and did you not know in 1871 that Joab Bagley sold this land to some men from Pennsylvania who were going to start and did start the furnace at Irondale? Was it not common neighborhood talk?

To 5th cross-interrogatory he saith: The N. W. ¼ of section 5, township 18 S., range 2 west, is mountainous land and is known as mineral land. It is not a fact that from the year 1873 to 1883 that the said 160 acres was spoken of and known in the neighborhood as the property of the Jefferson Iron Company. I did not know that Joab Bagley sold this land in 1871 to men from Pennsylvania who were going to start the Irondale furnace, but Mr. Bagley told me that he did sell the land to those men. It was a common neighborhood talk that Joab Bagley sold this land to those Pennsylvania men.

Cross-int. 6. Do you know anything of one Ira O'Bar? Have you ever been in his cabin? Was it not a small log house with a garden and a little enclosure? In what particular portion of the 160 acres was it situated? Did you not know of the efforts of the Jefferson Iron Company to dispossess this O'Bar? Was it not common neighborhood talk that the Jefferson Iron Company was trying

for several years from 1874–'5–'6, and until later, to get this O'Bar off of this 160 acres, claiming said land as their own?

283 To 6th cross-interrogatory he saith: I knew Ira O'Bar during his lifetime. I have been to his cabin and it was a small log house with a garden and a little enclosure around it. I do not know exactly the portion of the 160-acre tract that Mr. O'Bar's house was on. I don't know the forty-acre tract that it was on. I know that efforts were being made from the year 1870 to the year 1879, or about that time, to get Mr. O'Bar off of this land, but I do not know what company or who it was trying to get him off of it. I only know that some one was making the efforts.

Cross-int. 7. Have you not for several years made it your business to squat on land adjacent to Birmingham and did you not in accordance with your habit squat on these three or four acres in said section 1 without any license or permission from any one, and did you not so tell Ellis Phelan at the corner between section- 1 and 6 in the early part of July, 1883?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 7th cross-interrogatory he saith: I have not made it a habit for the last several years to squat on land adjacent to Birmingham, but I did take possession of these three or four acres in section 1, because my son rented land which was in section 6. I did not tell Mr. Phelan that I made it a habit to squat on land adjacent to Birmingham.

Cross-int. 8. You are asked to tell all that occurred between you and Ellis Phelan on the land in controversy. State if the following is not the fact: That Ellis Phelan met you on this land and at the N. E. corner and then and there told you in the presence of George Massey that he had made a bargain for the purchase of said land, and that he had come to take possession of that portion lying in the field cultivated by you, being about four or five acres in said

284 S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and that you told him all you wanted was your crop then growing on the land, and that said Phelan asked you to name a price for said crop, and you said you would take thirty dollars for it; and that thereupon, said Phelan told you he would give you his note, payable October 1st, 1883, for thirty dollars for the crop, and that you might, if you choose, take the crop when ready for gathering and in payment of the note; and that he did execute his note and take full and undisputed possession of said three or four acres, and that you agreed to it; and that afterwards, with his permission, you gathered the crop and took it in lieu of the thirty dollars and delivered up the note to said Phelan, and that ever since said Phelan has been in undisturbed possession of said three or four acres. Isn't the above the statement of the facts?

To 8th cross-interrogatory he saith: It is true that Ellis Phelan met me on the land at the N. E. corner. He then and there, in the presence of George Massey, told me that he had made bargain for

the purchase of said land, and that he had come to take possession of that portion lying in the field cultivated by me, being about four or five acres in said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and I told him that all I wanted was my crop then growing on the land. Mr. Phelan did ask me to name a price for said crop, but I did not tell him that I would take thirty dollars for it. Mr. Phelan did tell me something about giving his note to me for thirty dollars, and that I might, if I chose, take the crop, when ready for gathering, and in payment of the note. One of my boys afterwards brought me a note from Mr. Phelan for thirty dollars, but there was not a note executed at the time this conversation took place. I had a crop on the three or four acres and considered myself in possession until I could get the crop off. Mr. Phelan did not take the full and undisputed possession until I gathered and
285 removed my crop, and it was the understanding that I was to gather the crop and return the note, but I did not take the crop in lieu of the thirty dollars. I did deliver up the note to said Phelan, and, so far as I know, said Phelan has ever since been in undisturbed possession of the three or four acres.

his
HENRY x MORROW.
mark.

Attest: E. J. SMYER.

In the Chancery Court of Jefferson County, Alabama.

MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to Richard C. Bearden, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

RICHARD C. BEARDEN, one of the said witnesses, deposeth and saith as follows:

Int. 1. Where do you reside, and how long have you so resided?

To 1st interrogatory he saith: I reside about three or four miles east of Birmingham, Alabama, and I have resided there about thirty years.

Int. 2. Are you acquainted with the N. E. ¼ of section 5, township 18 S., range 2 west; and, if so, for how long have you known said land?

To interrogatory 2nd he saith: I am acquainted with the N. E. ¼ of section 5, township 18 S., range 2 west. I have known the land for about thirty years.

Int. 3. If you have known this land intimately since 1870, please state who, if any person, has been in possession of the same since 1870, and state if you have not known said land as R. R. land ever since the A. & C. R. R. was built through Birmingham, in 1871.

286 To 3rd interrogatory he saith: I have known this land since 1870, and no one has been in the possession of the said land since 1870 except Ira O'Bar until he was dispossessed some five or six years ago. Since O'Bar went off of said land it has been claimed by the Alabama & Chattanooga Railroad Company. I am mistaken in the above answer I have given to the 3rd interrogatory. Ira O'Bar lived on the N. W. ¼ of section 5, township 18 S., range 2 west, from the year 1870 up to five or six years ago, and this is the land that I was thinking of when I made my answer to 3rd interrogatory. Both the N. E. and N. W. ¼ has been known as railroad land ever since the Alabama & Chattanooga railroad was built through Birmingham, Alabama.

Int. 4. If you say one Ira O'Bar was in possession of said land from 1866 to 1879, please state, if you know, how he came into possession and the reason he gave up the said land.

To the 4th interrogatory he saith: Ira O'Bar was not in possession of the N. E. ¼, but was in possession of the N. W. ¼ from the year 1866 to the year 1879. He went on the land with the intention of claiming it as a homestead, was my understanding. My understanding was that he gave it up because he and the railroad company got into a lawsuit and they put him out.

Int. 5. State any and ever- other fact and circumstance within your knowledge not already stated by you which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 5th interrogatory he saith: I know no other fact or circumstance connected with any of the said land other than what I have already stated.

R. C. BEARDEN.

287 Complainant objects to the 4th interrogatory, viz., these words: "And the reason he gave up said land," because it is illegal and irrelevant and, as to complainants, hearsay, and without waiving any objections.

Cross-interrogatories.

Cross-int. 1. Was it not a matter of common notoriety that the Jefferson Iron Company claimed to own this land from 1873 to the present time? Did you not know that in 1871 some Pennsylvania men purchased this land from Joab Bagley, and that very soon thereafter they started up the Irondale furnace?

To 1st cross-interrogatory he saith: It was not a matter of common notoriety that the Jefferson Iron Company claimed to own the said land from 1873 to the present time, so far as I know. I did not know that some Pa. men purchased this land from Joab Bagley in the year 1871. I do know that the Irondale furnace was put up

about that time, but know nothing about any purchase of this land by them.

Cross-int. 2. Did you not hear Joab Bagley say that he had purchased this 160 acres from the Alabama & Chattanooga Railroad Company, and that he had sold it to the Pennsylvania men?

To 2nd cross-interrogatory he saith: I did not hear Joab Bagley say that he had purchased said land from the Alabama & Chattanooga Railroad Company and had sold it to some Pennsylvania men.

Cross-int. 3. How far is this land from Irondale? Was it not a matter of common notoriety that the Jefferson Iron Company were trying for several years to get Ira O'Bar off of this 160-acre tract?

To 3rd cross-interrogatory he saith: This land is about four miles from Irondale. It was a matter of common notoriety that the Jefferson Iron Company were trying for several years to get Ira O'Bar off of this place. I do not know that fact, but O'Bar told me that they had offered him a large sum for the place.

288 Cross-int. 4. Did not O'Bar occupy a log cabin and a small inclosure on this 160 acres, and is it not a fact that the Jefferson Iron Company disputed his right to this 160 acres, or any part of it, and that they tried to get him off of this land?

To 4th cross-interrogatory he saith: O'Bar did occupy a log cabin with a small inclosure around it on the land. I do not know anything about the Jefferson Iron Company disputing O'Bar's right to the said 160 acres or any part thereof or of their trying to get him off of the land.

Cross-int. 5. Was not O'Bar simply a squatter on this land and had been for many years, and that he pretended to claim it under the homestead or the pre-emption laws of the United States? And is it not a fact that he had nothing on which to base this claim except his own interpretation of the United States land laws?

To 5th cross-interrogatory he saith: I reckon he would be called a squatter. He told me that he went there to claim it as a homestead. O'Bar had been on this land for many years. I do not know what he based his claim upon. He told me that he went on the land to claim it as a homestead, but under what law he claimed or what he thought about the law or upon what he based his right I do not know.

Cross-int. 6. Is it not a fact that when Swann & Billups, trustees, recovered this 160 acres from Ira O'Bar in an action of ejectment in the circuit court of Jefferson county, Alabama, and before the writ of possession was served upon him by the sheriff, he had abandoned the land? State all you know about this.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 6th cross-interrogatory he saith: I know nothing about any suit in ejectment brought by Swann & Billups, trustees,
289 against O'Bar for this 160 acres of land and don't know

whether or not he abandoned the land before the writ of possession was served upon him.

R. C. BEARDEN.

In Chancery Court of Jefferson County.

MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to W. F. Nabers, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

W. F. NABERS, one of the said witnesses, deposeth and saith as follows:

Int. 1. Where do you reside and for how long have you so resided?

To 1st interrogatory he saith: I reside in Birmingham and have been so residing for about thirty years.

Int. 2. Please state if you are acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west; and, if so, for how long have you known said lands?

To 2nd interrogatory he saith: I am acquainted with the S. E. ¼ of the S. E. ¼ of section 1, township 18 S., range 3 west. I have known said land for 25 or 30 years.

Int. 3. If you say you have known said land since the year 1870, please state if any person within your knowledge has resided upon or occupied said land since between the years 1870 and 1881?

To 3rd interrogatory he saith: I have known the said land since 1870, and between 1870 and 1881 a negro by the name of George Massey has been living on said land. He is the only person that I know of who resided on the said land during the said time.

Int. 4. Please state if you ever tried to purchase or lease the lime rock and timber on the said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and if after you found said land contained lime rock you did not inquire around from different persons as to
290 who owned the said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and after such inquiries if you were not informed that it was railroad land and belonged to the Alabama & Chattanooga railroad land grant.

To 4th interrogatory he saith: I did, or Thomas Wildsmith and I tried to lease the lime rock and timber on the said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west. Thomas Wildsmith, after we found said land contained lime rock, inquired for me and him around from different persons as to who owned the said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west. I made no inquiry myself. After such inquiry by Wildsmith I was *the* under the impression that Wildsmith told me that it belonged to the Alabama & Chattanooga railroad grant, but Wildsmith has since told me that he did not tell me that he was informed that the land belonged

to the Alabama & Chattanooga railroad grant, but said that he told me that he was informed (by Mr. Ellis Phelan) that this land belonged to some men up north.

Int. 5. Please state, after receiving this information, if you did not go to the office of Messrs. Swann & Billups, trustees for the Alabama & Chattanooga railroad lands, and tried to lease said lands from the agent of said trustees.

To 5th interrogatory he saith: I did not go to the office of Swann & Billups, trustees for the Alabama & Chattanooga Railroad Company, and try to lease the said land from their agent after I received this information. I was under the impression that Mr. Wildsmith made application to lease said land from the agent of Swann & Billups, trustees, but he has recently informed me that he did not make any such application.

Int. 6. Please give the year you applied or tried to lease said land and any other particular in connection with the said land and
291 said lease that you have knowledge of.

To 6th interrogatory he saith: I never tried or applied to lease the said land, as I have more fully answered in my answer to the 5th interrogatory.

Int. 7. State any and every other fact and circumstance within your knowledge not already stated by you which relates in any way to said land, or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 7th interrogatory he saith: I have already stated all I know concerning the matter.

W. F. NABERS.

Cross-interrogatories to be Propounded to W. F. Nabers.

Cross-int. 1. Did you not hear and was it not well known in the neighborhood and at Elyton, Ala., in 1870 and 1871, that Joab Bagley had purchased of the Alabama & Chattanooga Railroad Company the S. E. ¼ of the S. E. ¼ of section 1, township 18 S., range 3 west? Did not Joel Bagley tell you before his death that he had purchased the above land and that he had sold it to the men who started the Jefferson Iron Company at Irondale?

To 1st cross-interrogatory he saith: It was understood along back, about 1870 or 1871 or—I don't know the time—but it was several years ago, in the neighborhood and at Elyton, that Joab Bagley had purchased the said land from the Alabama & Chattanooga Railroad Company. Joab Bagley did not inform me that he had purchased the said land and had sold the same to the men who started the Jefferson Iron Company at Irondale.

Cross-int. 2. What was the character of the land? Was it
292 not mountainous and mineral land? Was it not so located that there were very few settlements near it? And until

the last two years was it not, from its location, off of any travelled way and frequented by very few people?

To 2nd cross-interrogatory he saith: The land is mountainous, and also is mineral land. It was so located that there were very few settlements near it. There was but little travel by or near the said place until within the last two or three years. It was from its location off from any travelled way and was not frequented by many people.

Cross-int. 3. When you tried to lease the lime rock, etc., on this forty acres, as inquired of in interrogatory 4, what prevented you? Were you not told by F. Y. Anderson, the agent of Swan & Billups, that the Jefferson Iron Company laid claim to this forty-acres tract? Did you consult the records of the probate court of Jefferson county? When did you make this application? Give the month and year.

WATTS & SON AND
O. W. UNDERWOOD.

To 3rd cross-interrogatory he saith: I did not make any applica- to lease the said land, as I have stated in my answer to 4th interrogatory. I had no conversation with Mr. Anderson on this subject. I did not consult the records of the probate court of Jefferson county.

W. F. NABERS.

In Chancery Court of Jefferson County.

MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to Pleasant Watkins, who resides in Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

PLEASANT WATKINS, one of the said witnesses, deposeth and saith as follows:

293 Int. 1. Where do you reside and how long have you so resided?

To 1st interrogatory he saith: I live about three miles southeast from Birmingham, Alabama, and have lived there ever since the war and before the war.

Int. 2. Are you acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west; and, if, so, how long have you known said land?

To 2nd interrogatory he saith: I know the S. E. ¼ of the S. E. ¼ of section 1, township 18 S., range 3 west, and I have known something of this land for the last eight or ten years or more.

Int. 3. If you have been acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, since 1871, please state if you have not known said land as railroad land ever since that time. If

yea, state if you have known any person to occupy or reside upon said land between the years 1871 and 1881; and, if so, please give name or names of person or persons, if any, you found residing upon said land and the time when you saw or found them there.

To interrogatory 3rd he saith: I have been acquainted with the land since 1871 and have known this land as railroad land since 1871. I have not known of any one residing on said land from the year 1871 to 1881, of my own knowledge.

Int. 4. State any and every other fact and circumstance within your knowledge not already stated by you which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 4th interrogatory he saith: I know nothing else about the said land.

P. H. WATKINS.

294 *Cross-interrogatories to be Propounded to Pleasant Watkins.*

Cross int. 1. Are you acquainted with the boundary lines around the forty acres inquired of in interrogatories 2 and three? How came you to inform yourself of these lines? Did you not know that this land, the forty acres inquired of, was the property of the Jefferson Iron Company? Was it not common neighborhood talk that Joab Bagley had bought this forty acres from the Alabama & Chattanooga Railroad Company?

To 1st cross-interrogatory he saith: I am not acquainted with the boundary lines of the forty acres of land inquired about in the direct interrogatories 2 and 3. I did not know that this forty acres of land inquired about was the property of the Jefferson Iron Company. It was not the neighborhood talk (so far as I know) that Joab Bagley had bought this said forty acres of land from the Alabama & Chattanooga Railroad Company.

Cross-int. 2. Did you know Ephraim Murphy? Do you remember when he cleared and fenced the three or four acres lying in the N. E. corner of this forty acres in section one? Did you not hear him say that he had got permission from Mr. James Thomas, superintendent of the Jefferson Iron Company, to fence and cultivate these three or four acres? Did he not claim to hold these three or four acres by permission of Mr. James Thomas?

To 2nd cross-interrogatory he saith: I do not know Ephraim Murphy. I do not know when he fenced and cleared the three or four acres in this forty-acre tract. I never heard him say that he had gotten permission from Mr. James Thomas, superintendent of the Jefferson Iron Company, to fence and clear these three or four acres. He did not claim to hold these three or four acres by permission of Mr. James Thoams, so far as I know.

Cross-int. 3. Did you ever try to inform yourself as to whom
295 this forty acres belonged to and why did you wish to know?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 3rd cross-interrogatory he saith: I never tried to inform myself as to whom the said forty acres of land belonged.

P. H. WATKINS.

We, W. H. Hunter and E. J. Smyer, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by us in the words of the witnesses, Robert Goode, M. J. Kilgore, Henry Morrow, Richard C. Bearden, W. F. Nabers, and Pleasant Watkins (or P. H. Watkins), were read over to each of them respectively; that they each respectively assented, swore to, and subscribed the same in our presence at the times and place herein mentioned; that proof hath been made before us of the identity of said witnesses; that we are not of counsel or of kin to either of the parties to said cause nor interested in the event thereof, and we inclose the said testimony, together with the said commission and interrogatories, direct and cross, to the said register in chancery, whence the same emanated, as our full execution of said commission.

Given under our hands and seals this 28th day of February, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

Bill of Costs.

Commissioners' fees	$30 00
William Goodwin, for serving six subpœnas at $1.00 each	6 00
William Goode, for 1 day's attendance as witness	1 50
296 William Goode, for six miles' mileage	30
Henry Morrow, for two days' attendance as witness	3 00
R. C. Bearden, one day's attendance as a witness	1 50
" " six miles' mileage	30
W. F. Nabers, for one day's attendance as a witness	1 50
Pleasant Watkins, for two days' attendance	3 00
" " mileage for six miles	30
	$49 20

Hon. Samuel F. Rice, Montgomery, Ala.

DEAR SIR: We have a commission in the case of Miller *vs.* Swann & Billups to take the deposition of a witness by name of Pleasant Watkins (colored). We have not been able to find a colored man of that name, but we find a white man by the name of Pleasant Watkins. We wish to know whether or not there is a mistake in your interrogatories and the commission, and whether or not it is a

white man or a negro you wish us to take the testimony of. Please see the attorneys on the other side of the case, if there is a mistake, and have them consent to a correction. Please answer.

Yours, &c.,

W. H. HUNTER,
E. J. SMYER,
Commissioners.

We agree that the above-named witness, whether white or colored, may be examined by the above-named commissioners or either of them.

Feb. 14th, 1885.

SAMUEL F. RICE,
Solicitor for Swann & Billups.
WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

297 Please strike out the word "colored" from Pleasant Watkins' name.

Judge Rice agrees.
February 16th, 1885.

ELLIS PHELAN.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. J. Smyer and W. H. Hunter, Esqs., of Jefferson county, in the State of Alabama, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of Henry Morrow, Mrs. M. J. Kilgore, Pleasant Watkins (colored), Richard Bearden, Robert Goode, and W. F. Nabers, material witnesses for the defendants in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and John Swann and John A. Billups, trustees, *et al.*, defendants; and we do hereby authorize and empower you, the said commissioners, to call and cause to come before you the said witnesses, at such time and place as you shall appoint, and their depositions on oath to take touching their knowledge of the matters and things in controversy in said cause or proceeding, and the said depositions, when so taken by you, shall be subscribed by said witnesses and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 6th day of February, A. D. 1885.

E. L. CLARKSON, *Register.*

Endorsed on the foregoing is the following: Published by order of court this 25th of May, 1885. E. L. Clarkson, register.

298 STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. J. Smyer and W. H. Hunter, Esqs., of Jefferson, in the State of ——, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of George B. Randolph, a material witness for the defendants in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and John Swann and John A. Billups, trustees, *et al.*, defendants; and we do authorize and empowor you, the said commissioners, to call and cause to come before you the said witness, at such time and place as you shall appoint, and his deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition, when so taken by you, shall be subscribed by said witness, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness A. O. Lane, register of said chancery court, at office, in Birmingham, this 3rd day of February, A. D. 1885.

E. L. CLARKSON, *Register.*

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER }
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.* }

Interrogatories to be propounded to George B. Randolph, who resides in Calhoun county, Alabama, a witness on behalf of Swann & Billups, trustees.

299 D. B. MILLER }
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.* }

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, we, the commissioners therein named, have called and caused to come before us the said George B. Randolph, the witness named in said commission, on this 11th day of February, 1885, at

the office of W. H. Hunter, in Birmingham, Alabama, and, having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, GEORGE B. RANDOLPH, the said witness, deposeth and saith as follows:

Int. 1. Please state if you ever resided in Jefferson county, Alabama; and, if so, at what time and what place.

To 1st interrogatory he saith: I have resided in Jefferson county, Alabama. I was residing in Jefferson county and in Birmingham, Alabama, in June and a portion of July, in the year 1881. I lived while in Birmingham on Twenty-first street and Sixth avenue. I also lived in Jefferson county, Alabama, about eight or ten days, on the S. E. ¼ of the S. E. ¼, section 1, township 18 S., range 3 west.

Int. 2. State if you are well acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and if you ever had possession of said land and if you ever resided upon the same; and, if so, for how long and in what year or years.

To 2nd interrogatory he saith: I am well acquainted with the said land. I have had the said land in my possession. I resided upon said land. I had the land in my possession from some time in June, 1881, until in July, 1883. I resided upon it eight or ten days in July, 1881.

Int. 3. State further if you ever built a house on said land and if the said house still belongs to you; and, if not, how you came
300 to dispose of it. State fully to whom and at what time and all you know about selling the same and attach copies to your deposition of any letters you may have received in reference to the selling of said house or the purchase of it from you.

To 3rd interrogatory he saith: I built a two-room house on the said land in June, 1881. The house does not now belong to me. I sold the house to Maj. Ellis Phelan in July, 1883. I sold this house to Mr. Phelan, and hereto attach copies of letters received from Maj. Phelan concerning this property and received from him concerning the purchase of the same; the said letters are marked Exhibit A. I sold the property for $100.00. I never gave Maj. Phelan any written instrument of any kind conveying to him the property.

Int. 4. Please state if you did not lease the S. E. ¼ of S. E. ¼ of section 1, township 18 south, range 3 west, from Messrs. John Swann and John A. Billups, trustees for the Alabama & Chattanooga railroad lands, through their agent; and, if so, give date of lease and how you came to such lease and any other information connected with the same within your knowledge.

To 4th interrogatory he saith: I did lease the said land from Swann & Billups through their agent, Mr. Anderson. I leased this land in July, 1881. I made application to Mr. Anderson to purchase this land. Mr. Anderson assured me that I would get a deed in not exceeding ninety days to the land. Upon that assurance I erected the house already referred to. After application to purchase and awaiting the deed to be made to me by Swann & Billups,

trustees, I leased the land in order to be in legal possession of the land.

Int. 5. If you built a house on the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, in the year 1871, state when you moved off of said land, and if you left any person in possession as
301 your tenant give the name of person, and if you left the house you built on said land in the hands of agent or agents, with powers and instruction to rent the same for you, please give the name of such agent or agents, and state fully all about the same.

To 5th interrogatory he saith: I did build a house on said land, as above stated. I moved off of the said land on or about the 20th of July, 1881. I left the property in possession of Captain Tyler, as my agent, with instructions to him to rent the same. I left no tenant in the house. Captain Tyler rented the property to some one and forwarded me some money as rent. I afterwards took the property out of the hands of Captain Tyler and put it in the hands of George Massey. As my agent, Massey forwarded me some money as rent. I then took the property out of the hands of Massey and put it in the hands of Messrs. Thompson & Hunter, as my agents, and they rented the property to some one for me, and were acting as my agents at the time I sold the said house, as before stated, to Maj. Phelan.

Int. 6. Please state if you ever made application to Messrs. Swann & Billups, trustees, &c., or to their agent at Birmingham, Alabama, to purchase the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west; and, if yea, state if you did not go to Ellis Phelan, at his office, in the city of Birmingham, Alabama, before making said application and ask him if the said John Swann and John A. Billups, trustees, could make you a good and lawful title to the said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west. State all that occurred between you and said Phelan and in what year or years.

To 6th interrogatory he saith: I did make application to purchase said land from Swann & Billups, as I have before stated. I did go to Maj. Phelan in Birmingham, Alabama, before I made the application to purchase, and asked him if Swann & Billups,
302 trustees, could make me a good title to said land.

Int. 7. If yea, please state what answer the said Phelan made to you and what advice he gave you in connection with said land. State fully any other particulars you may have knowledge of in reference to the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west.

To 7th interrogatory he saith: Mr. Phelan, when I went to him and asked him if Swann & Billups, trustees, could make a good title to the said land, told me that he thought they could, but for me to wait a few days, until he could see some book. My recollection is the tax book was the book he wanted to see. He afterwards met me and told me that he was satisfied that Swann & Billups could make good title to the land. After this I made my application to purchase. This is, in substance, all that passed between me

and Maj. Phelan concerning this property up to the time he proposed to purchase the said house before mentioned.

Int. 8. State every other fact and circumstance within your knowledge, not already stated by you, which relates in any way to said land or to any matter involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 8th interrogatory he saith: I think I have stated all I know relating to this land in my answers to the other interrogatories.

G. B. RANDOLPH.

Objections.

Complainant objects to the 4th interrogatory because it asks the witness to testify in regard to a lease, and the legal inference is that said lease was in writing, and best evidence of it is the written lease, and because said question calls for hearsay testimony and because it is illegal and irrelevant.

303 And he objects to the 6th interrogatory because it calls for illegal and irrelevant testimony and because it calls for declarations of Ellis Phelan, and such declarations are illegal and incompetent as against complainant, and were (an omission in record) opinion, and because the question asking the witness to state all that occurred between witness and said Ellis Phelan and in what year or years is too general for cross-examination, besides the objection to it made above; and complainant objects to interrogatory 7th for the same reasons, irrelevancy, and because it calls for the opinion of a person not shown to be authorized to speak for the complainant and because it calls for hearsay testimony; and he objects to interrogatory 8th because it is too general upon which to propound cross-question, and is therefore illegal; and complainant objects to the witness answering.

And without waiving the objections above set forth complainant propounds the following:

Cross-int. 1. Is it not a fact that very soon after you built the house you are asked about in your direct examination you were sued in ejectment in the circuit court of Jefferson county, Alabama, at the suit of John Swann & John A. Billups, trustees, for the possession of the said forty acres? When was the writ served on you? Was it not some time in 1884, and was not said suit commenced in the year 1881, on the 20th day of July, or about that time? Give the exact date you commenced to build said house and when you finished it.

To 1st cross-interrogatory he saith: I was informed soon after I had built and moved out of the house that suit was brought against me by Swann & Billups, trustees, to recover possession of this property from me, but no papers of any kind were ever served on me concerning this property. Since refreshing my recollection I re-

member that there were some papers sent or brought to me
304 (my recollection is that the papers were sent to me by mail) concerning this property, which may have been process in ejectment, but as I felt no further interest in the property I paid no attention to the papers and do not know what became of them, but think I sent them to Mr. Phelan, or what they were, but think they were papers in a suit concerning this property. This was after I had sold the house to Maj. Phelan. These papers were received by me in 1884, but I don't remember when the suit was commenced nor the exact time that I received the papers. As I had no further interest in the property, I paid no attention to the suit. I commenced to build the house about the latter part of June, and it was finished about the 10th or 11th of July, 1881. I can't remember the exact dates.

Cross-int. 2. Have you not, ever since you left Jefferson county, Alabama, been living at Talladega and at Anniston, Alabama? When did you leave Jefferson county? Is it not a fact that you never lived in the house built by you (and of which you were asked above), but that you rented it out to some negroes? If you did live in it, state how many days you lived in it, and whether your family was with you.

To 2nd interrogatory he saith: I left Jefferson county, Alabama, about the 24th or 25 of July, 1881, and have lived in Talladega and Anniston, Ala., ever since that time. I did live in the house built by me and for the length of eight or ten days, as before stated; my family was with me in said house for said time.

Cross-int 3. Have you attached the letters written to you by Ellis Phelan in regard to the purchase of said house? Now, please examine the two letters here shown to you, and say whether or not you wrote them and whether they were in answer to the letters of said Phelan; and, if yea, attach them or have them attached or have the commissioner to attach them (with appropriate reference) to your deposition.

To 3rd cross-interrogatory he saith: I have attached copies
305 of the letters written to me by Mr. Phelan concerning the purchase of this property. I have examined the letters shown to me and they were written by me to Mr. Phelan. They were written by me in answer to his letters, and I hereto attach the two letters marked as "Exhibit B."

Cross-int. 4. Is it not a fact that, desiring to purchase the said forty acres (the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west), you made application to F. Y. Anderson, the agent at Birmingham, Ala., and that nothing else was done, and that thereupon you commenced to build the house without any further lease or any further permission from F. Y. Anderson, the agent? Did not the said Anderson promise you that you should have a deed to the land within ninety days from the application? Why did he refuse? Did you demand a deed? Did you offer to comply with the terms? What were the terms? Was it all cash or part cash and part on time? State fully.

To 4th interrogatory he saith: I did desire to purchase said land

and did commence to build upon it after I had made application to purchase and before I had made the lease. I did this upon Anderson promising me that I should have a deed to the land within ninety days from the time I made application to purchase, nor has a deed been made to me. I don't think Anderson ever refused to make me a deed, for I never demanded one from him. I made no further offer to comply with the terms than that made by me at the time I made my applications to purchase. The terms agreed upon on the first application was at $20.00 per acre, ¼ cash and ¼ to be paid annually for three years. The terms of the second application were $27.50 per acre, and the terms of payment were the same as the former. These applications were made within two weeks of each other.

Cross-int. 5. Before commencing suit did the said F. Y. Anderson, agent, make a demand on you that you comply with the
306 terms? Is it not a fact that within ninety days from the time you made application you were sued in ejectment by Swann & Billups?

To 5th cross-interrogatory he saith: Anderson has never made any demand on me to comply with the terms. No papers were served on me in an ejectment suit within ninety days from the time I made the said application.

Cross-int. 6. Is it not a fact that about the time you made the application to F. Y. Anderson, the agent, and before you commenced to build the house, that you talked with Ellis Phelan about the title to this forty-acre tract, and that the said Ellis Phelan examined the record of deeds in the probate office of Jefferson county, and that he informed you that they showed that Joab Bagley purchased the land from the Alabama & Chattanooga Railroad Company and there were deeds recorded showing regular conveyance of this land from Joab Bagley down to the Jefferson Iron Company and from this company to Dr. D. B. Miller, trustee? Do you not remember that the said Ellis Phelan explained to you the status of this land and advised you that if you purchased from Swann & Billups you would buy a lawsuit? If he did not tell you that, what did he tell you?

To 6th cross-interrogatory he saith: I had a conversation with Mr. Phelan on two different occasions before I commenced to build the said house about the property. In my second conversation with Mr. Phelan he told me that he had examined some book, my recollection is it was the tax book, and that he thought that Swann & Billups, trustees, could make good title to the land. I think that Mr. Phelan or some one informed me that Joab Bagley had purchased this land from Stanton. I have no recollection of Mr. Phelan telling me that there were deeds on record showing regular conveyance from Joab Bagley down to the Jefferson Iron Company or
307 from them to D. B. Miller, trustee. I have no remembrance of Mr. Phelan explaining the status of this matter to me, nor of his advising me that if I purchased from Swann & Billups, trustees, that I would purchase a lawsuit. He did tell me that

he thought that Swann & Billups, trustees, could give me a good title.

Cross-int. 7. Did you make any defence to the suit of Swann and Billups against you, and have you made any effort to procure a deed from Swann & Billups? Have they ever offered to make you one?

To 7th cross-interrogatory he saith: I made no defence to the suit of Swann & Billups against me. I have made no effort to procure a deed from Swann & Billups and they have not offered to make me one.

Cross-int. 8. You are asked in your direct examination about a lease. If you say there was a lease, state whether or not it was in writing. If in writing, attach a copy to your deposition.

To 8th cross-interrogatory he saith: There was a lease made, and it was a written lease. I hereto attach a copy of said lease, which is marked "Exhibit E."

G. B. RANDOLPH.

"EXHIBIT A."

STATE OF ALABAMA,
OFFICE OF SECRETARY OF STATE,
MONTGOMERY, *July 28th*, 1883.

DEAR SIR: Enclosed I send you my check on B'h'm Nat'l b'k for $50.00 and my note for $50.00, payable 1st January, 1884, for fifty dollars, payable at same bank, in payment of the house referred to in your letter.

Very truly, ELLIS PHELAN.

STATE OF ALABAMA,
OFFICE OF SECRETARY OF STATE,
MONTGOMERY, *July 26th*, 1883.

308 DEAR SIR: Your favor received and noted. I really think one hundred dollars a fair value for the house. It has been very much abused—chimney in a bad fix, window panes broken out, &c. I could build a better for $100.00. If you will take that I will pay you fifty cash in check on B'h'm Nat'l b'k and give you my note, payable at same place January 1st, 1884. I think this is all the house is worth. We are so near together in figures that we ought not to split. I did not think I would give more than $75.00, but your letter was in such a spirit that I feel like doing more than I intended. Let me hear soon.

Yours truly, ELLIS PHELAN.

EXHIBIT "A."

STATE OF ALABAMA,
OFFICE OF SECRETARY OF STATE,
MONTGOMERY, *July* 23*d*, 1883.

Mr. Geo. B. Randolph.

DEAR SIR: I have purchased the forty acres of land in section 1, township 18, range 3 west, *laying* next to my land near B'h'm, in same section, and have been put into possession of the entire forty acres. This necessitated my occupying with a tenant the house you built partly on this forty and partly on my place, as I ascertained to a certainty by a survey made by J. A. Ray, county surveyor. While I do not recognize any right on your part to claim the house and think you acted rather unwisely in erecting it, still I have made it a rule of my life to deal justly with every one, and, as soon as I can, I expect to offer what is a fair return for your investment. The title is as I told you. Joab Bagley bought the land of the A. & C. R. R. Co. Sept. 13th, 1870, and I have the original certificate of purchase in my possession. Those under whom I claim—McKee,
309 Thomas & Co., Jefferson Iron Company, and Dr. D. B. Miller—have been in possession, holding adversely under Joab Bagley, deceased, since October 17th, 1871. Mr. Swann, it seems, doesn't recognize any sales made under the Stanton management, but I am not uneasy on that score. In order to quiet titles I have offered Mr. Swann a fair price for a quitclaim. I am not at all uneasy and will hold the land any way. Dr. Miller, president of Oxmoor furnace, will defend my title. The purpose of this letter is to let you know that it is my intention to try and deal in a spirit of fairness about the house. If you choose to submit your lowest amount that you think you ought to have for the house I will consider it. I do not know that I can command the ready cash just now.

Yours truly, ELLIS PHELAN.

EXHIBIT B.

TALLADEGA, ALABAMA, *July* 27*th*, 1883.

Hon. Ellis Phelan, Montgomery, Ala.

DEAR SIR: Your favor of yesterday containing proposition to purchase my house near Birmingham and offering $100.00 for same is received. After due consideration I have concluded to accept the same—$50.00 cash in check on B'h'm, $50.00 in your note, payable Jan. 1st, 1884.

Yours truly, G. B. RANDOLPH.

310 EXHIBIT B.

TALLADEGA, ALA., *July 25th*, 1883.

Hon. Ellis Phelan, Montgomery, Ala.

DEAR SIR: Yours of the 25th inst. concerning purchase of house near Birmingham is received. In reply, would state that your suggestions, I think, are reasonable, and as I always desire to avoid litigation, will state as follows: By referring to my bills, I find that I paid B. T. Davis & Co., lumber dealers, in Birmingham, July 7th, 1881, for lumber, shingles, etc., $71.14; Mark Bradford, col., for building house, $25.00; Capt. A. A. Tyler, for erecting chimney and putting on lock, $18.35; F. P. O'Brien, sash and doors, $5.10, besides the nails, hinges, etc., $19.59, the bills which I cannot find at present, but will bring it up something over $120.00; so, if agreeable, please make out a bill of sale for the house and sent it up, when I will sign and return it. You can send me a check for the amount, $120.00, or, if you prefer, send me your note for that amount, payable three or six months; most any way will suit me. I would not have erected the building only for the assurance of the A. & C. land agent, Mr. Anderson, that I should have a deed within ninety days from application. I would have been glad to have purchased the place, but if there is to be litigation over it, I prefer getting out of the way.

Very truly, G. B. RANDOLPH.

The building is covered with first-class cypress shingles and No. 1 flooring.

311 EXHIBIT E.

LAND DEPARTMENT, ALABAMA & CHATTANOOGA RAILROAD LANDS,
BIRMINGHAM, ALA., *July 18th*, 1881.

Whereas I am the occupant of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, in Jefferson county, Alabama, as a tenant of John Swann & John A. Billups, trustees, I therefore agree to pay the rent at maturity, take good care of the improvements and fences, and deliver the possession of the same and of said land to the agents of said Swann & Billups, trustees, on or before the 15th day of January, 1882, or on any previous day if I fail to keep and fulfil any part of my aforesaid agreement and obligation, and any agent of said trustees, for such failure, shall demand possession of said land of me.

Witness my hand and seal.

G. B. RANDOLPH. [L. S.]

Attest: JOHN J. WHITE,
Third District.

$2.00. BIRMINGHAM, ALA., *July 18th*, 1881.

On the 15th day of January, 1882, I promise to pay to John Swann and John A. Billups, trustees, or their agent, two dollars, for value received; and, so far as this debt is concerned and in consideration thereof, I hereby expressly waive my right to have exempt to me any personal property which the constitution and laws of the State of Alabama exempt now or may exempt hereafter to any resident of said State from sale on execution or other legal process of any court issued for the collection of any debt.

No. —. G. B. RANDOLPH.

We, W. H. Hunter and E. J. Smyer, the commissioners in
312 said commission named, do hereby certify that the foregoing testimony and answers, taken down and written by us in the words of the witness, George B. Randolph, were read over to him; that he assented, swore to, and subscribed the same in our presence at the time and place herein mentioned; that we have personal knowledge of the personal identity of said witness; that we are not of counsel or kin to either of the said parties to said cause nor interested in the event thereof; and we inclose the said testimony, together with the interrogatories, direct and cross, and the commission to the said register in chancery, whence the same emanated, as our full execution of said commission.

Given under my hand and seal this 11th day of February, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

George B. Randolph claims two days' attendance, at $1.50	$3 00
" " " 128 miles traveled	6 40
Our commissioners' fee	12 00
Total cost	$21 40

Endorsed on the foregoing is the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To W. H. Hunter and E. J. Smyer, Esqs., of Jefferson county, in the State of Alabama, or to such one or more as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto at-
313 tached, of John J. White and Henry L. Wheeler, material witnesses for the defendants in a certain cause or proceeding

now pending and undetermined in our said chancery court, wherein D. B. Miller is plaintiff and Swann & Billups, trustees, *et al.*, defendants; and we do hereby authorized and empower you, the said commissioners, to call and cause to come before you the said witnesses, at such time and place as you shall appoint, and their depositions on oath to take touching their knowledge of the matters and things in controversy in said cause or proceeding, and the said depositions, when so taken by you, shall be subscribed by said witnesses, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same — us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 27th day of January, A. D. 1885.

E. L. CLARKSON, *Register.*

In Chancery Court of Jefferson County.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to John J. White, of Birmingham, Ala., a witness for said Swann & Billups, trustees.

Int. 1. Please state where you resided in the year 1881, and what positions, if any, you occupied during that year, and in whose office, and who was the agent of Swann & Billups, trustees, in 1881 and since, and where the office of the agent was in 1881 and since.

JOHN J. WHITE, one of the witnesses, deposeth and saith as follows:

To 1st interrogatory he saith: In the year 1881 I resided in Birmingham, Ala. I was clerk and local agent for the trustees of the A. & C. railroad lands. I was in the trustees' (of the
314 A. & C. R. R. lands) office here at Birmingham. F. Y. Anderson was at that time the general agent of Swann & Billups and since. The office of the general agent at that time—that is, during the year 1881 and since—has been in Birmingham, Ala., in what is known as the First National Bank building.

Int. 2. If you say you were clerk and local agent in the office of the agent of Birmingham, Ala., under John Swann and John A. Billups, trustees for the Alabama & Chattanooga railroad lands for the sale of said lands, please state if one Ellis Phelan ever came to you at the office of said trustees, Messrs. Swann & Billups, and made a written application through you, as said agent, to purchase the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, from the said trustees.

To 2nd interrogatory he saith: As I have stated, while I was clerk and local agent for the trustees of the A. & C. R. R. lands, as

aforesaid, Ellis Phelan did come to me at the office of the trustees and through me made application for the purchase of forty acres of land, the land being described as follows, to wit, S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, in Jefferson county, Alabama.

Int. 3. If yea, attach copy of said application and give all the particulars within your knowledge in reference to Mr. Phelan's exertion to purchase said land from said trustees or from their agent, F. Y. Anderson, and where the office of said agent was at that time.

To 3rd interrogatory he saith: I hereby attach a copy of said application, which is marked "Exhibit A." I have borrowed the original, of which this is a true and correct copy, the original belonging and being on file in the office of the trustees. Mr. Phelan came to me in the office of the said trustees while I was agent, etc., as aforesaid, and made through me application to purchase the land I have heretofore described. He offered to give ($25.00) twenty-
315 five dollars per acre for the land, one-fourth of the purchase-money to be paid in cash, one-fourth in twelve, one-fourth in twenty-four, and one-fourth in thirty-six months.

Int. 4. State any and every other fact or circumstance within your knowledge relating to any matter or issue involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 4th interrogatory he saith: I do not recollect any other fact or circumstance connected with this cause other than what I have stated.

JOHN J. WHITE.

The complainant objects to the second interrogatory because it calls for evidence which is illegal, incompetent, and irrelevant to the issue in this case, and he objects, second, because no proposition made by said Ellis Phelan, whether written or verbal, is legal evidence against him, and he objects, third, that if such proposition was legal evidence against him the written application or proposition is higher and better evidence than the witness' recollection of its contents.

2. The complainant objects to the third interrogatory, first, because it is illegal, incompetent, and irrelevant, and seeks evidence which is illegal and incompetent against him, and, second, because the witness is asked to attach a copy of said application and not the original. The original is the best evidence, if it is competent at all.

3. The complainant objects to the fourth interrogatory because it is too general and indefinite to admit of cross-examination and because it does not call for any specific fact or circumstance and because it leaves to the trustees to determine what fact or circumstance relates to the matters or issues involved in this case; third,

316 because it does not in any manner indicate what is expected to be sworn by the witness.

Subject to the foregoing objections and without waiving them or either of them, complainant files the following cross-interrogatories:

Cross-int. 1. What is your business or occupation now? And what has been your business or occupation for each of the last twelve years? And where have you resided for or during each of the twelve years? Have you now or have you had any business connection with the defendants or either of them? If so, when and how? Were you not the clerk of the said Anderson? Was he not in the employment of Swann & Billups? When was this, and how long were you so engaged or employed?

To 1st cross-interrogatory he saith: I am now employed as clerk in the trustees' office of the A. & C. R. R. lands. In part of the year 1872 and 1873 I was keeping hotel in Birmingham, Ala. In the latter part of 1873 I was clerk in a store in Atlanta, Georgia. For about the first six months in 1874 I was on my uncle's plantation in Elbert county, Georgia. In the latter part of 1874 and nearly all of 1875 I was in Huntsville, Ala., keeping hotel. In the year 1876 I was a clerk in the hotel at Helena, Arkansas; also a portion of 1877. In the year- 1877-'8-'9 I was book-keeper and cotton weigher on a plantation in Mississippi. I came back in May or June, 1880, to Birmingham, and in June or July, 1880, I went to work in the trustees' office of the A. & C. R. R. lands, and remained working in said office until November or December, 1881. In a portion of 1882 I was clerk in the office of T. H. Aldridge, in Birmingham. In a portion of 1882 I was also employed as assistant clerk in the office of the trustees of the A. & C. lands. In the winter of 1883 and January, 1884, I was employed as clerk in the auditor's office of Wabash, St. Louis, Mo. In February, 1884, I came back to Birmingham and was for awhile employed in the office of the trustees of the A. & C. R. R. lands. For awhile, in 1884, I
317 was employed as a clerk in the office of the A. G. S. R. R. Co. For awhile, in 1884, I was clerk in the office of Maj. Wheeler, in Birmingham. In the fall of 1884 I went to Atlanta, Georgia, on a visit and came back to Birmingham about the 9th of January, 1885, and on the Monday following I went to work in the trustees' office, where I am now employed. I have lived during the last twelve years where my business called me, as I have stated in the first part of my answer to the first cross-interrogatory. I have already stated that I have been in the employment of the defendant several different times since 1880, and am now in their employment. I was clerk for the trustees, Swann & Billups, but not for Anderson. Mr. Anderson was and is general agent for Swann & Billups, and I have been working in the same office with Mr. Anderson and under him. I have been in the employment of the trustees, off and on, since 1880, as I have already stated, and this was at their office in Birmingham, Alabama.

Cross-int. 2. If, in answer to the direct interrogatory, you say that

Ellis Phelan ever came to you and made a written application to purchase the land named, where is that written application? Did Ellis Phelan write or sign that written application in your presence?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 2nd cross-interrogatory he saith: Ellis Phelan did come to me made and make a written application. The written application he is now in my hand. I borrowed — from off the file in the office of the trustees of the A. & C. R. R lands, where it belongs, in order to make a copy of it. Ellis Phelan did sign that written application in my presence.

JOHN J. WHITE.

We consent that commission may issue to W. H. Hunter and E. J. Smyer, of Birmingham, with authority to either of them
318 to take the answers of the witnesses and the interrogatories.
January 24th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

EXHIBIT A to Deposition of John J. White.

Copy.

Alabama & Chattanooga Railroad Land Grant.

Application for land, to be sent to the trustees for approval.

BIRMINGHAM, ALA., *June 30th*, 1881.

Lot or section: S. E. ¼ of S. E. ¼, sec. 1.
Block or t'p: 18 S.
Range: 3 W.
Town or county: Jefferson.
Dist. from road: 1½ miles.

Minerals reserved.

The undersigned hereby applies to purchase the above-described land.

Quantity, forty acres		Papers to be made out in the name of Ellis Phelan.
Price per acre	$25 00	
Total am't of purchase	1,000 00	Married or unmarried, ——.
Cash payment	250 00	Residence, Birmingham, Alabama.
Number of notes, three	750 00	Post office, Birmingham, Alabama.
Am't of each note	250 00	

When due: One note in twelve, one in twenty-four, and one in thirty-six months, and hereby bind myself to carry out the same, the terms as above, upon the approval of this application and the execution of a deed.

(Signed) ELLIS PHELAN.

State here whatever may be of service in determining the acceptance of this application.

Rough and hilly. Lies on side and top of Red mountain. The price offered is the full value of this land.

(Signed) JOHN J. WHITE,
Land Agent.

The foregoing exhibit A to the deposition of John J. White is partly printed and partly written in the original on file.

319 In Chancery Court of Jefferson County.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et als.*

Interrogatories to be propounded to Henry L. Wheeler, a resident of Birmingham, Alabama, a witness for said Swann & Billups, trustees.

Int. 1. Please state how long you have resided in Jefferson county and what, if any, official position you occupied in 1873 and 1874.

H. L. WHEELER, one of the said witnesses, deposeth and saith as follows:

To 1st interrogatory he saith: I have been in Jefferson county since 1872. In 1873 I was county surveyor and held that position for several years.

Int. 2. State if you are acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west, and with the S. E. ¼ of S. E. ¼ of section 1, township 18 south, range 3 west; and, if so, for how long a time were you acquainted with said lands and how you came to be acquainted with the same.

To 2nd interrogatory he saith: I have run out all the lines of section 5, township 18 S., range 2 west. I have set all the section corners. I am acquainted with the said lands for ten years. I became acquainted with the land by surveying it and by frequent visits since I surveyed it.

Int. 3. State if you were not county surveyor for Jefferson county, Alabama, in the year 1873 and longer, and if you did not, as such county surveyor, survey said land in 1873.

To 3rd interrogatory he saith: I was county surveyor in 1873, and as such surveyor I did survey the said land in 1873.

Int. 4. If you did survey said lands state how you came to make said survey and who, if any person, you saw or found in possession of the same, and to whose ownership you assigned and marked

down said land in making up your map from said survey,
320 as said county surveyor, made in 1873 and 1884.

To 4th interrogatory he saith: I was surveying Red mountain, and this land was in my survey. I have since surveyed lands for parties owning land adjacent to the said land, and in making these surveys I surveyed the said land There was an old man by the name of Murphy who was cultivating a little corner of the said land, but no one was in possession of the land. I marked the said land down on my map as A. & C. R. R. land.

Int. 5. State, further, if you have been over the N. W. ¼ of section 5, township 18 S., range 2 west, and the S. E. ¼ of the S. E. ¼ of section 1, township 18 S., range 3 west, since 1873; and, if so, state who, if any person, you saw or found in possession of the same; and if you found or saw any person or persons, give name or names of such person or persons and full particulars within your knowledge of the state in which you found said land when you went over them during the year 1873 and since then.

To 5th interrogatory he saith: I have been over the said lands since 1873. I don't remember about who, if any one, was in the possession of the said land in section 5, but S. E. ¼ of S. E. ¼ of section 1 was in possession of no one at that time.

Int. 6. Please state if you are acquainted with one Ephraim Murphy, colored; and, if so, how long.

To 6th interrogatory he saith: I leased said Murphy the south ½ of S. W. ¼ of section 6, township 18, range 2 west, as agent for Tinny Hillman. I think this was in the year 1879.

Int. 7. State if you ever leased or knew of any person leasing any lands to him; and, if so, please describe the land so leased. Give the date of said lease and state fully all you know about said lease and the land leased to said Murphy.

321 To 7th interrogatory he saith: I leased said Murphy the S. ½ of S. W. ¼ of section 6, township 18, range 2 west, as agent for Tinny Hillman. I think this was in the year 1879.

Int. 8. State, further, if you ever surveyed the land upon which the said Ephraim Murphy resided; and, if so, give full description of said land by quarter sections, townships, and range.

To 8th interrogatory he saith: I have surveyed the land upon which said Murphy resided and have given a full description of it in my answer to the 7th interrogatory.

Int. 9. If you say you are fully acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, state how long you have known said land and if you ever surveyed the same. If so, state if you have ever known any person or persons to be in possession of the same since you first became acquainted with the land, in 1873; and, if so, state name or names of said person or persons.

To 9th interrogatory he saith: I am acquainted with the said land described. I have surveyed it and surveyed it frequently. I have known the land since 1873. No one has been in possession of the land until within the last three or four years. Some one has

built a shanty or house on the line and partly on the said land. The line splits the house about half in two.

Int. 10. State, further, if you have not always known since 1873 that said N. W. ¼ of section 5, township 18, range 2 west, and the S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, was owned and claimed by the trustees of the Alabama & Chattanooga railroad lands, Messrs. Swann & Billups, and if your maps and plats made while you were county surveyor of Jefferson county, Alabama, in 1873, so shows said ownership.

To 10th interrogatory he saith: I have had the said lands marked on my maps since 1873 as A. & C. R. R. lands, owned and
322 claimed by the trustees for said railroad land. My maps and plats made by me as county surveyor do show said ownership.

Int. 11. State any and every other fact and circumstance within your knowledge relating to any matter or issue involved in the above-entitled cause.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

To 11th interrogatory he saith: I have stated all I know about this matter.

H. L. WHEELER.

We, W. H. Hunter and E. J. Smyer, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by us in the words of the witnesses, John J. White and H. L. Wheeler, were read over to them; that they assented, swore to, and subscribed the same in our presence at the times and places herein mentioned; that we have personal knowledge of the personal identity of said witnesses; that we are not of counsel or kin to either of the parties to said cause nor interested in the event thereof, and we inclose the said testimony, together with said commission and interrogatories, direct and cross, to the said register in chancery, whence the same emanated, as our full execution of said commission.

Given under our hands and seals this 1st day of April, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

Costs.

John J. White, one day's attendance	$1 50
H. L. Wheeler, " "	1 50
Commissioners' fee	9 00
Total	$12 00

323 D. B. MILLER
vs.
SWANN & BILLUPS.

Objections and cross-interrogatories to the witness H. L. Wheeler, to whom direct interrogatories have been filed by the defendant.

1. The complainant objects to the 3rd interrogatory because it is illegal and incompetent and calls for evidence irrelevant to any issue in this case.

2. Complainant objects to the 4th interrogatory because it is illegal, incompetent, and irrelevant, and because each part thereof calls for illegal and incompetent evidence, and complainant objects specially to that part of the 4th interrogatory in the following words, viz: "and to whose ownership you assigned and marked down said land in making your maps from said survey as said county surveyor, made in 1873 and 1884," because the same is illegal and incompetent and calls for illegal and incompetent and irrelevant evidence. Complainant objects to that part of the 5th interrogatory in the following words, viz: "and full particulars within your knowledge of the status in which you found said lands when you went over there during the year 1873 and since then," because the same is illegal, incompetent, and irrelevant and calls for illegal, incompetent, and irrelevant evidence. Complainant objects to the 6th interrogatory because the same is illegal and irrelevant and calls for evidence which is illegal, incompetent, and irrelevant; and complainant objects to the 7th interrogatory for the same reasons as given to the 6th interrogatory, and he objects to 8th interrogatory for same reasons, and he objects to the 9th for the same reasons. Complainant objects to the 10th interrogatory because the same is illegal, incompetent, and irrelevant and calls for illegal, irrelevant, and incompetent evidence; it calls for hearsay, the opinion of the witness, and for maps and surveys made by the witness, and for inferences
324 from said maps. Complainant objects to the 11th interrogatory because it is too indefinite and general as to admit or allow of cross-examination, and it leaves to the witness to determine what fact or circumstance relates to the matter or issue involved in this case. The complainant insists upon the foregoing objections and each of them separately, and without waiving them or either of them, but subject to them, he consents that commission may issue to E. J. Smyer and W. H. Hunter, of Birmingham, Ala., as commissioners, with authority to *with authority to* either of them to take the answers to said interrogatories.

January 24th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

On the foregoing is endorsed the following: Published by order of the court May 25th, 1885. E. L. Clarkson, register.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS *et al.*

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, we, the commissioners therein named, have called and caused to come before us the said John N. Jenkins, the witness named in said commission, on this 5th day of March, 1885, at the office of W. H. Hunter, and, having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, JOHN N. JENKINS, the said witness, deposeth and saith as follows:

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN *et al.*

Interrogatories to be propounded to John N. Jenkins, a witness for defendants, Swann & Billups, which, with answers thereto,
325 will be read in evidence on the trial of the above-entitled cause.

Int. 1. Please state where you now reside, and how long you have so resided, and from whom you purchased the land you now reside upon, and if you have been in peaceful possession of the same since said purchase, and when you made purchase of said land, and describe the numbers of the land you reside on. State if you are acquainted with the N. W. ¼ of section 5, township 18, range 2 west; and, if so, for how long.

To 1st interrogatory he saith: I now reside on section 5, township 18 S., range 2 west, and have resided there about three years. I purchased the land I now reside on from the Alabama Great Southern Land Company, and have been in the peaceful possession of the same since said purchase. I made the said purchase about three years ago. The exact time I do not remember. I reside on the N. W. corner of the N. W. ¼ of section 5, township 18 S., range 2 west. I am acquainted with the N. W. ¼ of section 5, township 18, range 2 west, and have been acquainted with said lands for five or six years.

Int. 2. Please state if you ever purchased any part of the said N. W. ¼ of section 5, township 17 S., range 2 west; and, if yea, state what part, and in what year you made said purchase, and from what person or persons you purchased said land, if at all.

To 2nd interrogatory he saith: I have never purchased any part of the N. W. ¼ of section 5, township 17 S., range 2 west, but did purchase the N. W. ¼ of the N. W. ¼ of section 5, township 18 S., range 2 west, as I have before stated. I think I made this purchase

in the year 1882. I purchased the said land from Maj. Anderson, agent of the Alabama Great Southern railroad lands.

Int. 3. Please state any other fact within your knowledge in reference to the N. W. ¼ of section 5, township 17 S., range 2 west.

February 14th, 1885.

SAMUEL F. RICE,
Solicitor for said Swann & Billups.

326 To 3rd interrogatory he saith: I know nothing about the N. W. ¼ of the N. W. ¼ of section 5, township 17 S., range 2 west, and know nothing further about this matter than what I have stated.

JOHN N. JENKINS.

Complainants object- to last interrogatory because it is too general upon which to propound cross-interrogatories, and, without waiving this—

Cross-int. 1. How long have you lived in Jefferson county? Did you not hear before you made your purchase that the Jefferson Iron Company claimed the N. W. ¼ of section 5, township 18, range 2 west? Was it not a matter well known in the neighborhood that the Jefferson Iron Company had for several years prior to 1879 been trying to get Ira O'Bar off of this land? Is it not a fact that you moved into the house that Ira O'Bar built on said 160 acres, and have you not frequently heard Ira O'Bar say that the Jefferson Iron Company tried for several years to put him off of this land?

To 1st cross-interrogatory he saith: I have lived in Jefferson county about fifteen years. I did not know nor did I hear before I made my purchase that the Jefferson Iron Company claimed the N. W. ¼ of section 5, township 18 S., range 2 west. I did not know the fact, if it was generally known, that for several years prior to 1879 the Jefferson Iron Company had been trying to get Ira O'Bar off of the said land. 'Tis not a fact that I moved into the house built by Ira O'Bar on the said land. I built my own house on the said land. I have never heard Ira O'Bar say that the Jefferson Iron Company for several years tried to put him off of the said land.

Cross-int. 2. Who first told you that this land was being offerred for sale by Swann & Billups? Did you make any examination of the title? Did you consult the record of conveyances in the probate office at Birmingham? If so, state fully all you did and
327 what you found. Did you not know that this land was purchased by Joab Bagley of the Alabama & Chattanooga Railroad Company in 1870 or 1871, and that certificates showing his purchase were recorded in volume 21, on pages 490 and 500? Did you not know there were deeds in record in said probate office showing a transfer of title of the said 160 acres from Joab Bagley to McKee, Fuller & Co., and from them in regular succession down to Dr. D. B. Miller, the complainant? Is your fort- to buy land without examining the titles?

To 2nd cross-interrogatory he saith: Mr. Richard Bearden first told me that the said land was being offered for sale by Swann & Billups. I made no examination as to the title of the said land at the probate office at Birmingham, Alabama. I did not know that this land had been purchased by Joab Bagley in 1870 or 1871 from the Alabama & Chattanooga Railroad Company, nor did I know that there was recorded any instrument showing the said purchase on the records of the probate office. I did not know that there were deeds on record showing the transfer of the said property from said Bagley to McKee, Fuller & Co., and from them in regular succession down to the complainant, D. B. Miller. It is not much my habit to buy land, and, as I thought I was buying from responsible parties, I thought an examination as to the titles of this land unnecessary and therefore made no examination of the title.

Cross-int. 3. Were you not informed by the agent of Swann & Billups who sold you this land that he would protect you against the claim of the Jefferson Iron Company or of Dr. D. B. Miller? Does not the deed under which you hold expressly reserve all minerals?

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

To 3rd cross-interrogatory he saith: I was not informed by the agent of Swann & Billups from whom I purchased this land that he would protect me against the claim of the Jefferson Iron
328 Company or the claim of Dr. D. B. Miller. The deed under which I now hold does expressly reserve all minerals.

JOHN N. JENKINS.

It is agreed that a commission shall issue to E. J. Smyer and W. H. Hunter, with authority to them or either of them to take deposition of John N. Jenkins.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

We, W. H. Hunter and E. J. Smyer, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by us in the words of the witness, John N. Jenkins, were read over to him; that he assented, swore to, and subscribed same in our presence at the time and place herein mentioned; that proof has been made before us of the identity of said witness; that we are not of counsel or of kin to either of said parties to said cause nor interested in the event thereof, and we inclose the said testimony, together with said commission and interrogatories, direct and cross, to the said register in chancery, whence emanated, as our full execution of said commission.

Given under our hands and seals this 5th day of March, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. J. Smyer and W. H. Hunter, Esqs., of Jefferson county, in the State of Alabama, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the
329 answers to the interrogatories and cross-interrogatories, hereunto attached, of John N. Jenkins, a material witness for the defendants in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and John Swann and John A. Billups *et al.*, defendants, and we do hereby authorize and empower you, the said commissioners, to call and cause to come before you the said witness, at such time and place as you shall appoint, and his deposition oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition, when so taken by you, shall be subscribed by said witness and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 24th day of February, A. D. 1885.

E. L. CLARKSON, *Register.*

Bill of Costs.

Commissioners' fee	$5 00
John N. Jenkins, one day's attendance	1 50
W. T. Blackburn, to fee for serving subpœna	1 00

Endorsed on the foregoing deposition is the following: Published by order of court May 25th, 1885. E. L. Clarkson, register.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. J. Smyer, Esq., of Birmingham, in the State of Alabama, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill,
330 and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of W. H. Hunter, a material witness for the defendants in a certain cause or proceeding now pending and undetermined

in our said chancery court, wherein D. B. Miller is plaintiff and John Swann *et al.* defendants; and we do hereby authorize and empower you, the said commissioner, to call and cause to come before you the said witness, at such time and place as you shall appoint, and his deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition, when so taken by you, shall be subscribed by said witness, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hand and seal, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of the said chancery court, at office, in Birmingham, this 20th day of May, A. D. 1885.

E. L. CLARKSON, *Register.*

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to William H. Hunter, a witness for and in behalf of the defendants, Swann & Billups, trustees, *et al.*, residing at Birmingham, Jefferson county, Alabama.

Int. 1. Are you a resident of Jefferson county; and, if so, how long have you so resided?

D. B. MILLER
vs.
JOHN SWANN & JNO. A. BILLUPS *et al.*

By virtue of the commission hereto annexed, issued from the office of the register in chancery for the county of Jefferson, State of Alabama, I, the commissioner therein named, have called and caused to come before me the said W. H. Hunter, the witness named
331 in said commission, on this 20th day of May, at his office, in Birmingham, Alabama, and having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, W. H. HUNTER, the said witness, deposeth and saith as follows:

To 1st interrogatory he saith: I am a resident of Jefferson county, Alabama, and have resided in the same for nearly three years.

Int. 2. Are you acquainted with the S. E. ¼ of the S. E. ¼ of section 1, township 18 S., range 3 west; and, if so, how long have you known said land? If yea, please state all you know about said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and the possession thereof, and by whom such possession was held, and at what date or dates each person held possession or control.

To 2nd interrogatory he saith: I am acquainted with the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west. I have known

said lands since December, 1882. On the 4th of December, 1882, George B. Randolph put me in possession of a certain house on the said S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, as his agent, with authority to rent the same for him, which I did, and collected a part of the rent on the same for March and April, 1883. Said house had two rooms, and the occupants of one room failed and refused to pay any rent. The renters were negroes, whose names I have forgotten.

Int. 3. Please state if you are acquainted with Mr. George B. Randolph; and, if yea, state if you hold a power of attorney from said Randolph, authorizing you to act for him as his agent in looking after, protecting, and collecting any and all rents arising out of and from the occupancy of said S. E. ¼ of S. E. ¼ of section 1, township 18 S., range 3 west, and if you ever received said power of attorney please attach the same or a copy thereof and make it a part of this deposition. State whether you acted under such power of attorney and at or about what time.

332 To 3rd interrogatory he saith: I am acquainted with George B. Randolph. I hold a power of attorney from him authorizing me to act for him as his agent in looking after, protecting, and collecting all rent arising out of and from the occupancy of the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and hereby attach a copy of said power of attorney, which is marked Exhibit A. I acted under said power of attorney from December, 1882, to June, 1883.

Int. 4. State further if you ever collected any rents from parties, tenants of the said G. B. Randolph, occupying said land and house thereon, and if yea state what disposition, if any, you made of said rents so collected. State further if you ever held possession, as agent of George B. Randolph, of a house on said S. E. ¼ of S. E. ¼, section 1, township 18 S., range 3 west, and if the key to the same has been or is still in your possession; and, if yea, state how and at what time you came in possession of said house and key and what, if any, disposition was made of said key.

To 4th interrogatory he saith: I did collect some rents from parties, tenants of said George B. Randolph, who occupied said house on said land, and accounted to said George B. Randolph for the same. As I have stated, I held possession, as agent for George B. Randolph, of a house on the S. E. ¼ of S. E. ¼, section 1, township 18, range 3 west. The key to one room of said house was delivered to me by a colored woman on the 18th day of June, 1883, which key I still have in my possession, said colored woman having surrendered possession of said room to me on that day.

Int. 5. State further fully any other fact or circumstance you may know in reference to said land and house.

SAMUEL F. RICE,
Solicitor for Swann & Billups.

333 To 5th interrogatory he saith: I made some further effort after the 18th of June, 1883, to rent the said property, but failed and notified Mr. Randolph of the fact, who shortly afterwards

notified me that he and Mr. Ellis Phelan had or was about to make a trade for said property, since which time I have exercised no control over the same. I was a member of the firm of Thompson & Hunter, to whom the said power of attorney was given.

W. H. HUNTER.

Without waiving any objections to the questions propounded to the witness, W. H. Hunter, — illegality or irrelevancy, we consent that a commission may issue to E. J. Smyer, of Birmingham, to take the testimony of said witness.

May 12th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.
SAMUEL F. RICE,
Solicitor for Swann & Billups.

I, E. J. Smyer, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by me in the words of the witness, W. H. Hunter, were read over to him; that he assented, swore to, and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of the said witness; that I am not of counsel or of kin to either of the parties to said cause nor interested in the event thereof, and I enclose the said testimony, together with said commission and interrogatories, to the said register in chancery, whence the same emanated, as my full execution of said commission.

Given under my hand and seal this 20th day of May, 1885.

E. J. SMYER. [L. S.]

Costs.

334	W. H. Hunter, witness fee	$1 50
	E. J. Smyer, commissioner's fee	3 00

EXHIBIT A.

BIRMINGHAM, ALA., *Dec. 4th*, 1882.

Messrs. Thompson & Hunter:

You are hereby appointed my agents, with full power to represent me in all matters pertaining to my propefty situated in the city of Birmingham, being a house near Parton's spring, on the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west. You are authorized to rent said property and collect said rent and, after deducting your percentage (10%), forward me the residue. Said property is now occupied by some colored people, who owe me three months' pay. George Massey, a colored man, has been my agent. All previous powers of attorney are hereby revoked.

December 4th, 1882.

GEORGE B. RANDOLPH.

In the Chancery Court of Jefferson County, Alabama.

D. B. MILLER
vs.
SWANN & BILLUPS, Trustees, *et al.*

Interrogatories to be propounded to E. L. Milner, a resident of Jefferson county, Alabama, a witness in behalf of Swann & Billups, trustees.

Int. 1. Do you reside in Jefferson county; and, if so, how long have you so resided?

To 1st interrogatory he saith: I reside in Jefferson county and have resided in said county since the year 1870.

Int. 2. Did you ever know Ira O'Bar; and, if so, how long have you known him? If you say you knew Ira A. O'Bar in 1879 or 1870, please state where he resided at that time and describe
335 the land that he resided on at that time by numbers; also describe and give the numbers of the land which he resided upon from the year 1869 up to and including the year 1879.

To 2nd interrogatory he saith: I know Ira O'Bar and have known him since the year 1878. I have seen him, however, previous to that time. I don't think I knew Ira O'Bar in 1869 and 1870. When I knew him first (in 1878) he resided on the S. E. ¼ of the N. W. ¼ of section 5, township 17, range 2 west. I don't know, of my own knowledge, where Ira O'Bar lived from 1868 to 1878. During the year 1878 and 1879 he resided on the land I have above described.

Int. 3. Please state if you were not an agent under John Swann & John A. Billups, trustees, for the sale of the Alabama & Chattanooga railroad lands in the year 1879. If yea, be kind enough to examine the certified transcript attached to these interrogatories and say if the returns therein set out, made by J. T. Reed, sheriff of Jefferson county, State of Alabama, under date of October 11th, 1879, in which the said Reed states, in pursuance of the judgment set out and attached, that he put you, as agent for and on behalf of John Swann and John A. Billups, trustees of the Alabama & Chattanooga railroad lands, into possession of the N. W. ¼ of section 5, township 18 S., range 2 west, is true and correct or not.

To 3rd interrogatory he saith: I was an agent under Swann & Billups, trustees, for the sale of the Alabama & Chattanooga railroad lands during the year 1879. I have examined the certified transcript attach- and the returns, signed by John T. Reed, sheriff of Jefferson county, under date of October 1st, 1879, and I state that the same is correct.

Int. 4. Are you acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west; and, if so, how long have you known said land? If you say you have known said land since 1869 or
336 1870, please state if any person or persons have had possession of said land since that time; and, if so, give name or names of said person or persons, and give the year that said person

or persons have had possession of said N. W. ¼ of section 5, township 18 S., range 2 west, up to date.

To 4th interrogatory he saith: I am acquainted with the N. W. ¼ of section 5, township 18 S., range 2 west, and have known said land since 1878. I had no personal knowledge of said land or its occupants prior to 1878, although I knew that some one lived there. Since I have known the land, in 1878, Ira O'Bar was in possession until some time in 1879. When I took possession of the land as agent of the company, when Ira O'Bar was dispossessed, I put one Kilgore into the house on said land as tenant (for the Alabama & Chattanooga Railroad Land Company). He lived there a while, but the exact time I do not remember. He then moved out, and shortly after he left the house on the land was burned down. So far as I know, since the house was burned down no one has been on the land as a tenant, but the land was and has been claimed as Alabama & Chattanooga railroad land.

Int. 5. If you say you are well acquainted with the said land and have surveyed and run out the lines of the said land, please state if you have ever heard any person or persons claim said N. W. ¼ of section 5, township 18 S., range 2 west; and, if so, give name or names of such persons and the dates and years, if possible, you heard of said claimants.

To 5th interrogatory he saith: I am well acquainted with the said land and have as surveyor run out three sides of the said tract. I have never heard any person claim said land, but I knew of the existence of a title given by one Stanton, under which one Bagley and Fields claimed, but this title was not considered valid.

Int. 6. Please state fully any other information you may know in connection with the possession and ownership of said land.

SAMUEL F. RICE,
Solicitor for Swann & Billups, Trustees.

337 To 6th interrogatory he saith: I know nothing further than what I have already stated.

E. L. MILNER.

The transcript in case of Swann & Billups *vs.* O'Bar is to be introduced, subject to all legal objections on part of complainant as to its relevancy or —, and subject to these the complainant propounds the following:

Cross-int. 1. Did you not know that Ira O'Bar held possession of the land he resided on without any title or claim of title, and was he not in fact a mere squatter? What kind of house did he live in? How much land did he enclose? When you went to put him off under the writ, did you not find that he had already abandoned the place?

To 1st cross-interrogatory he saith: I know that Ira O'Bar did reside on the said land without any title, and I further know that he was merely a squatter. The house he lived in was a small log house, about sixteen feet by twenty feet, and there was about one and

a half acres of land enclosed. When we went to put him off under the writ we found that he had already abandoned the place.

Cross-int. 2. Did you know that the Jefferson Iron Company claimed this land, and that they had so claimed it for many years? Did you not know that the Jefferson Iron Company had for several years prior to 1879 been trying to get Ira O'Bar off of this land, and was it not a matter generally known in the neighborhood during the years 1873 and 1874, and up to the time you served the writ you are asked about, that the Jefferson Iron Company claimed this land, and that they held through Joab Bagley, who originally purchased it from the A. & C. R. R. Co.? Please state all you may know on this point, and state the character of this land, its proximity to Birmingham, whether fit for cultivation, and whether settlements around it were numerous or scarce.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

338 To 2nd interrogatory he saith: I did not know that the Jefferson Iron Company claimed this land. I never heard of any claim of this company at any time until now. I did not know that the Jefferson Iron Company had for several years prior to 1879 been trying to get Ira O'Bar off of the said land. I never heard anything about the Jefferson Iron Company trying to get Ira O'Bar off of the land, and if it was a matter generally known or known at all in the neighborhood at that time, I am not aware of that fact. I know nothing about the Jefferson Iron Company claiming under Joab Bagley, but knew that Bagley had a claim through Stanton, but if he asserted his claim I do not know it. There is very little of the land fit for agricultural purposes. It is regarded as mineral land, and it is about two miles from the courthouse in Birmingham. The settlements around were scarce.

E. L. MILNER.

We agree that a commission shall issue to E. J. Smyer and W. H. Hunter, as commissioners, with authority to them or either of them to take the deposition of E. L. Milner.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.

We, W. H. Hunter and E. J. Smyer, the commissioners in said commission named, do hereby certify that the foregoing testimony and answers, taken down and written by us in the words of the witness, E. L. Milner, were read over to him; that he assented, swore to, and subscribed the same in our presence at the time and place herein mentioned; that we have personal knowledge of the personal identity of said witness; that we are not of counsel or of kin to either of the said parties to said cause nor interested in the event thereof; and we inclose the said testimony, together with said com-

mission and interrogatories, direct and cross, to the said reg-
339 ister in chancery, whence the same emanated, as our full execution of said commission. Given under our hands and seals this 1st day of May, 1885.

W. H. HUNTER. [L. S.]
E. J. SMYER. [L. S.]

Costs.

E. L. Milner, one day's attendance	$1 50
Commissioners' fee	6 00
	$7 50

SWANN & BILLUPS
vs.
IRA A. O'BAR. } 742. Ejectment.

Be it remembered that on the 7th day of September, 1878, the plaintiff sued out a summons and complaint against the defendant in words and figures as follows, to wit:

THE STATE OF ALABAMA,
Jefferson County.

Circuit Court.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Ira A. O'Bar to appear at the next term of the circuit court to be held for said county at the place of holding the same, then and there to answer the complaint of John Doe on the demise of John A. Billups and John Swann. Witness this 7th day of September, A. D. 1878.

R. S. MONTGOMERY, *Clerk.*

Complaint.

THE STATE OF ALABAMA,
Jefferson County.

Circuit Court, Fall Term, 1878.

340 Richard Roe was attached to answer John Doe in a plea whereof he, the said Richard Roe, with force and arms, etc., entered into the following-described land, to wit, the N. W. ¼ of section 5, township 18, range 2 west, situated in the county of Jefferson, State of Alabama, which said lands above described the State of Alabama, by and through its duly authorized agent, the governor of said State, had demised to the said John Doe for a term of fifteen years from April 15th, 1872, which is not yet expired, and ejected him from the said farm; and also wherefore the said Richard Roe,

with force and arms, etc., entered into certain other lands of the following —, to wit, the N. W. ¼ of section 5, township 18, range 2 west, situated in the county of Jefferson, State of Alabama, which lands above described John A. Billups, a trustee duly appointed by the governor of Alabama in pursuance of an act of the General Assembly of said State entitled "An act to ratify and confirm the settlement of the existing indebtedness of the State as *re*posed in the report of the commissioners appointed under the act approved 17th December, 1874," and John Swann, the trustee appointed by the bondholders, by virtue of the authority granted by said — John Doe for the term of fifteen years, from April 10th, 1872, which is not yet expired, and ejected him from his said last-mentioned farm; by virtue of which said several demises the said John Doe entered into the said several tenements first, secondly on the land above mentioned, with the appurtenances, and became and was possessed thereof for the said several terms so to him respectively granted as aforesaid; and, the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 10th day of March, in the year 1872, and at other times aforesaid, with force and arms entered into the said tenements, with the appurtenances, first, secondly on the land above mentioned, to which the said John Doe was so interested in manner and for the several *times* aforesaid, which are not yet expired, and ejected the said John Doe from his several farms,
341 and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe and against the peace of the State of Alabama; where*of* the said John Doe saith he is injured and hath sustained damages to the value of ten thousand dollars, and therefore he brings this suit, etc.

RICE & WILEY AND
TERRY & LANE,
Plaintiff's Attorneys.

Ira O'Bar:

I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned or to some part thereof, and I, being sued as a casual ejector only and having no claim or title to the same, do advise you to appear at the next term of the circuit court of the State of Alabama, to be holden for Jefferson county, on the 7th day of October, A. D. 1878, by some attorney of that court, and then and there, by the rule of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment therein to be entered against me by default and you will be turned out of possession.

Dated this 7th day of September, 1878.

Yours, etc.,

RICHARD ROE.

Filed in the office of the clerk of circuit court this 7th day of September, 1878

R. S. MONTGOMERY, *Clerk.*

Sheriff's Return.

Not found in my county.

J. C. REED, *Sheriff.*

And now, this fall term, 1878, of the circuit court of said
342 county, the following proceedings were had, to wit: In this cause it appearing to the court that the defendant was not served with a copy of the summons and complaint in this cause, it is therefore ordered by the court that alias summons and complaint issue for said defendant, and that this cause stand continued until the next term of this court.

Alias Summons and Complaint.

THE STATE OF ALABAMA, }
Jefferson County. }

Circuit Court.

To any sheriff of the State of *the State of* Alabama, Greeting:

Again you are hereby commanded to summon Ira A. O'Bar to appear at the next term of the circuit court to be held for said county, at the place of holding the same, then and there to answer the complaint of John Doe on the demise of John A. Billups and John Swann.

Witness this 20th day of November, 1878.

R. S. MONTGOMERY, *Clerk.*

Complaint.

THE STATE OF ALABAMA, }
Jefferson County. }

Circuit Court, Spring Term, 1879.

Richard Roe was attached to answer John Doe in a plea whereof he, the said Richard Roe, with force and arms, etc., entered into the following-described lands, to wit, the N. W. ¼ of section 5, township 18, range 2 west, in the county of Jefferson, State of Alabama, which said lands above described the State of Alabama, by and through its duly authorized agent, the governor of said State, had demised to the said John Doe for a term of fifteen years from April
10th, 1872, which is not yet expired, and ejected him from his
343 ssid farm; and also wherefore the said Richard Roe, with force and arms, etc., entered into certain other lands of the following description, to wit, the N. W. ¼ of section 5, township 18, range 2 west, situated in the county of Jefferson and State of Alabama, which said lands above described John A. Billups, a trustee duly

appointed by the governor of the State of Alabama in pursuance of "An act of the General Assembly of said State entitled 'An act to ratify and confirm the settlement of the existing indebtedness of the State as proposed in the report of the commissioners appointed under the act approved 17th of December, 1874,'" and John Swann, the trustee appointed by the bondholders, by virtue of the authority granted by said act had demised to the said John Doe for a term of fifteen years from April 10th, 1872, which is not yet expired, and ejected him from his said last-mentioned farm; by virtue of which said several demises the said John Doe entered into the said several tenements, first, secondly on the land above mentioned, with the appurtenances, and became and was possessed thereof for the said several terms so to him respectively granted as aforesaid; and, the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 10th day of March, in the year 1872, and at other times aforesaid, with force and arms entered into the said tenements, with the appurtenances, first, secondly on the land above mentioned, to which said John Doe was so interested in manner and for the several terms aforesaid, which *is* not yet expired, and ejected the said John Doe from his several farms, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe and against the peace of the State of Alabama; wherefore the said John Doe saith he is injured and hath sustained damages to the value of ten thousand dollars, and therefore he brings this suit, etc.

RICE & WILEY AND
TERRY & LANE,
Plaintiff's Attorneys.

344 Ira O'Bar:

I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned or to some part thereof, and I, being sued in this action as a casual ejector only and having no claim or title to the same, do advise you to appear at the next term of the circuit court to be held for Jefferson county, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment therein to be entered against me by default and you will be turned out of possession.

Dated this 7th day of September, 1878.

Yours, etc., RICHARD ROE.

Sheriff's Return.

Received in office 24th of November, 1878.

J. T. REED, *Sheriff.*

Executed by handing a copy of the within summons and complaint to Ira A. O'Bar.

February 24th, 1879.

J. T. REED, *Sheriff,*
By J. M. FRANKLIN, *S. D. S.*

And now, on this the 10th day of April, 1879—that is say, the spring term, 1879, of the circuit court of said county—came the parties, by the attorneys, and, issue being joined, thereupon came a jury of good and lawful men, to wit, Thomas Y. Cain and eleven others, who, being empannelled, sworn, and charged well and truly to try the issue joined and a true verdict render according to the evidence, upon their oaths do say: We, the jury, find the defendant guilty of the trespass as complained of in plaintiff's complaint, and assess the damages for the detention thereof at one cent. It is therefore considered by the court that the plaintiff have and re-
345 cover of the defendant the following-described land, situate in the county of Jefferson and State of Alabama, to wit: The N. W. ¼ of section 5, township 18, range 2 west, and one cent damages for the detention thereof, as found by the jury aforesaid, together with the costs in this behalf expended, for which let writ of possession and execution issue.

Writ of Possession.

THE STATE OF ALABAMA, }
Jefferson County. }

To any sheriff of said State, Greeting:

You are hereby commanded to deliver to John Swann and John A. Billups, trustees, etc., possession of the lands and tenements, which said Swann & Billups, trustees, etc., recovered of Ira A. O'Bar, by the judgment of our circuit court held for the county of Jefferson, on the 10th day of April, 1879, viz., the N. W. ¼ of section 5, township 18, range 2 west, in Jefferson county, Alabama. You are further directed of the goods and chattels, lands and tenements, of the said Ira A. O'Bar you cause to be made the sum of one cent damages, adjudged to the said Swann & Billups, and also the further sum of $23.55, costs of suit, and make return of this writ and the execution thereof according to law.

Witness my hand this the 24th day of April, 1879.

R. S. MONTGOMERY, *Clerk.*

Sheriff's Return.

Received in office 24th April, 1879, and executed by putting E. L. Milner, agent of plaintiffs, in possession of the property sued for, and no property of defendant found to satisfy nor any part thereof.

October 1st, 1879.

J. C. REED, *Sheriff.*

346 *Clerk's Certificate.*

THE STATE OF ALABAMA, }
Jefferson County. }

I, R. C. Bradley, clerk of the circuit court in and for the county aforesaid, do hereby certify that the foregoing transcript is a true and correct copy of all the proceedings, order, etc., had in the circuit court of said county in the case of Swann & Billups, trustees, *vs.* Ira A. O'Bar, including the judgment entry and the writ of possession issued thereon, together with the sheriff's return on said writ of possession, as the same appears of record and from the files in my office.

Given under my hand and seal of office this the 29th day of January, A. D. 1885.

R. C. BRADLEY,
Clerk of the Circuit — of Jefferson County, Ala.

STATE OF ALABAMA, }
Jefferson County. }

Chancery Court.

To E. J. Smyer and W. H. Hunter, Esqs., of Jefferson county, State of Alabama, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioners to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of E. L. Milner, a witness for the defendants in a certain cause or proceeding now pending and undetermined in our said chancery court, wherein D. B. Miller is complainant and John Swann and John A. Billups *et al.*, defendants; and we do hereby authorize and
347 empower you, the said commissioners, to call and cause to come before you the said witness at such time and place as you shall appoint, and depositions on oath to take touching *thrir* knowledge of the matters and things in controversy in said cause or proceeding, and the said deposition, when so taken by you, shall be subscribed by said witness and the same you shall, together with this commission, return to us with all convenient speed; and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness E. L. Clarkson, register of said chancery court, at office, in Birmingham, this 16th day of February, A. D. 1885.

E. L. CLARKSON, *Register.*

Alabama & Chattanooga Railroad Company
to
Joab Bagley.

No. 80. Entry taker's office, Alabama & Chattanooga Railroad Company.

CHATTANOOGA, TENN., *Sept. 13th*, 1870.

This is to certify that I, Daniel J. Duffy, land commissioner for the *sale of the* Alabama & Chattanooga Railroad Company, successors to Wills Valley Railroad Company, for the sale of lands granted to said company by act of Congress approved June 3d, 1856, and subsequent act of Congress to the Alabama & Chattanooga Railroad Company, reviving said act of June 3d, 1856, approved April 10th, 1869, have this day sold to Joab Bagley, of Elyton, of the county of Jefferson, State of Alabama, the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, and W. ½ of N. W. ¼ and N. E. ¼ of N.
348 W. ¼ of section 5, township 18, range 2 west, of section- 1 and 5, in township 18, of range- 2 and 3 west, containing one hundred and sixty acres, situated in Jefferson county, Alabama, according to the original survey, at two dollars and a half per acre ($2.50), amounting to four hundred dollars; one-fourth paid in hand, and the remaining due and to be paid in three equal instalments, with legal interest from date hereof.

This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company, by its president, secretary, or other duly authorized, agent when the full amount of the purchase-money, with its interest, is paid.

And it is further agreed by the said Joab Bagley that in accepting this certificate if any portion of the purchase-money and interest shall remain unpaid sixty days after the last instalment is due the entry taker of the said Alabama & Chattanooga Railroad Company may, upon giving thirty days' notice in three public places, one of which shall be his office and the remaining two in the county in which said land is situate, proceed to sell said above-described land to the highest bidder for cash in hand without any further or other proceedings than the above.

The said Bagley having purchased the right to the minerals and mining privileges upon said lands, the same are released by—

Witness my hand and seal the day and date last above written.

THE ALABAMA & CHATTANOOGA
RAILROAD COMPANY,
By DANIEL J. DUFFY,
Land Commissioner.

I accept the provisions of the above certificate freely and voluntarily.

Witness my hand and seal this 13th day of September, A. D. 1870.

JOAB BAGLEY. [L. S.]

Signed, sealed in the presence of us—
ARTHUR B. PAINE.

349 Filed for record in my office the 19th day of October, 1874.
J. C. MORROW,
Judge of Probate.

And this deed was on the 19th day of October, 1874, duly recorded in Deed Book, volume 21, pages 498–99.
J. C. MORROW,
Judge of Probate.

Alabama & Chattanooga Railroad Company
to
Joab Bagley.

No. 257. Entry taker's office, Alabama & Chattanooga Railroad Company.

This is to certify that I, Daniel J. Duffy, land commissioner of the Alabama & Chattanooga Railroad Company, successors to the Wills Valley Railroad Company, for the sale of lands granted to said company by act of Congress approved June 3d, 1856, and subsequent act of Congress to the Alabama & Chattanooga Railroad Company, reviving said act of June 3d, 1856, approved April 10th, 1869, have this day sold to Joab Bagley, of the county of Jefferson, State of Alabama, the S. E. ¼ of the N. W. ¼ of section 5, in township 18, of range 2 west, containing forty acres, situated in Jefferson county, Alabama (an omission here), acres, according to the original survey, at two dollars and a half per acre ($2.50), amounting to one hundred dollars—twenty-five dollars paid in hand—and to be paid in three equal instalments, with legal interest from date hereof.

This is therefore to entitle the said Joab Bagley to receive a deed for the above-described tract of land from the said railroad company, by its president, secretary, or other duly authorized agent, when the full amount of the purchase-money, with its interest, is paid.

350 And it is further agreed by the said Joab Bagley that in accepting this certificate if any portion of the purchase-money and interest shall remain unpaid sixty days after the last instalment is due the entry taker of the said Alabama & Chattanooga Railroad Company may, upon giving thirty days' notice in three public places, one of which shall be his office and the remaining two in the county in which said land is situate, proceed to sell above-described land, in front of his office, to the highest bidder for cash in hand, without any further or other proceedings than the above.

Witness my hand and seal the day and date last above written.
THE ALABAMA & CHATTANOOGA
RAILROAD CO.,
By DANIEL J. DUFFY,
Land Commissioner.

I accept the provisions of the above certificate freely and voluntarily.
Witness my hand and seal this 24th day of January, A. D. 1871.
JOAB BAGLEY. [L. S.]

Filed for record in my office on the 19th day of October, 1874.
J. C. MORROW,
Judge of Probate.

And this deed was on the same day of the month and year duly recorded in Deed Book, volume 21, pages 500–'1.
J. C. MORROW,
Judge of Probate.

351 THE STATE OF ALABAMA, }
Jefferson County, }

Circuit Court.

To W. L. Eakin, Esq., of Chattanooga, in the State of Tennessee, or to such one or more of you as shall act herein, Greeting:

Know ye that we, reposing confidence in your integrity, skill, and ability, have appointed you commissioner to take the answers to the interrogatories and cross-interrogatories, hereunto attached, of John C. Stanton, material witness for the defendant Jackson, in a certain cause or proceeding now pending and undetermined in our said circuit court, wherein Swann & Billups are plaintiffs and James A. Curry and J. B. Jackson and J. M. Haygood defendants; and we do hereby authorize and empower you, the said commissioner, to call and cause to come before you the said witness, at such time and place as you shall appoint, and his deposition on oath to take touching his knowledge of the matters and things in controversy in said cause or proceeding; and the said deposition, when so taken by you, shall be subscribed by said witness, and the same you shall, together with this commission, return to us with all convenient speed, and you shall likewise certify the same to us, under your hands and seals, in all things fully and explicitly how you have executed this commission.

Witness Richard C. Bradley, clerk of said circuit court, at office, in Birmingham, this 3d day of April, A. D. 1880.
RICHARD C. BRADLEY, *Clerk.*

352 THE STATE OF ALABAMA, }
Jefferson County. }

In the Circuit Court, Spring Term, 1880.

JOHN DOE *ex Dem.* SWANN & BILLUPS
vs.
JAMES A. CURRY, J. F. B. JACKSON, & J. M. HAYGOOD. } Ejectment.

Interrogatories by the defendant J. F. B. Jackson in the above-entitled cause, to be propounded to J. C. Stanton, who is a material witness for the defendant J. F. B. Jackson in the above-entitled cause, and whose testimony on the following interrogatories he will offer to read on the trial of this cause; the said witness resides at Chattanooga, Tennessee.

Int. 1. Did you or not know a corporation on or about the 3d of September and continuously thereafter until on or about the 12th of August, 1871, known and called by the name of the Alabama & Chattanooga Railroad Company, or, by abbreviations, the A. & C. R. R. Co.; and did you during the time named know, or not, D. N. Stanton, A. F. Thayer, J. T. Burr, Robert Cranath, Henry E. Waite, A. M. Johnson, J. L. McCollum, T. C. Severan, D. L. Dalton, J. H. Valalstine, D. J. Duffey, Fred. Wolffe, F. B. Loveness, A. C. Lippitt, John Demerritt, Robert Patton, and C. A. Miller, Benj. F. Pain, B. P. Belknap?

Witness says in answer to interrogatory 1st: I know such a corporation and all the gentlemen mentioned in the question, except Mr. Wolfe. I do not think I knew him at that time.

Int. 2. If you please, state whether or not you had any business connection with the corporation or any of the gentlemen named about the time named; and, if so, state what that business connection —.

In answer to interrogatory 2nd he answers: I was superintendent for the construction and running of said road at the time mentioned.

353 Int. 3. State whether or not the corporation named had a president and board of directors, a general superintendent, and other officers of the corporation. And, if yea, who were they about the time named?

In answer to interrogatory 3rd he answers: This company did have a president, superintendent, some other officers, and a board of directors. The president was D. N. Stanton; H. E. Waite, local treasurer at Chattanooga, Tennessee. I do not remember whether Mr. Burr or Mr. Wheeler was treasurer in 1870. As I stated before, I was general superintendent. The directors were F. E. Loomis and Mr. Lippitt, of New London, Connecticut; Louis Rice, of Boston; John C. Stanton, of West Newton, Mass.; D. N. Stanton, then of New York; Henry Clews, of New York, and others whose names I do not now recall.

Int. 4. If you say you were the general superintendent of the corporation about the time named and that D. N. Stanton was the president, state what relationship, if any, existed between you and the said D. N. Stanton.

In answer to interrogatory 4th he says: D. N. Stanton is my brother.

Int. 5. If you say you were the general superintendent, state what authority was given you by the company over the construction of their enterprise, if any, and over the sale of their railroad lands, if any.

In answer to 5th interrogatory he says: I had the entire charge of the road here. As I have stated, I had the entire charge of the construction of the road and running the road. I was authorized by the company to sign deeds and bonds for title to or for lands donated by the State of Alabama to the A. & C. Railroad Company and sold by such company or its agents.

Int. 6. Did you employ any sub-agents in the land department of the corporation; and, if yea, who were they and what was
354 their duties, and what authority had you to employ them, and when and for what time were they employed?

In answer to interrogatory 6th he says: I was not an agent to sell the lands. The company authorized me to employ an agent to sell the lands. I first employed B. P. Belknap, and afterwards Daniel J. Duffy. The company authorized me to employ them. Their duties were to sell lands belonging to the company and make returns and reports of sale and turn over all the proceeds of such sales to Henry E. Waite, local treasurer, at Chattanooga, Tennessee.

Int. 7. Did you or not ever communicate to the president and any of the directors, either in writing or otherwise, or have it done that any of your sub-agents were selling the lands of the company and disposing of the proceeds of the sales; and, if so, state specifically how often you communicated with or to them on the subject and what did they do or say at the time. State fully.

In answer to interrogatory 7th he says: I reported to the company that the lands were being sold. It was the duty of local treasurer, who had or should have had charge of the proceeds, to make such reports to the company. I do not now remember any specific statements made by the president or directors on this subject. We never have talked personally on the subject, I know.

Int. 8. Did the president and directors know what you did in relation to the railroad land, or what your sub-agents did? State fully. Did they know what the proceeds of the sales were applied to; and, if so, did they make any objection or not, and, if any objection, what?

In answer to interrogatory 8th he says: They should have known through their local treasurer, and I do not remember that any objections were ever made to any sale at the time.

355 Int. 9. State any other matter or thing that will benefit the defendant J. F. B. Jackson.

H. M. SOMERVILLE AND
TERRY & LANE,
Attorneys for Defendant Jackson.

(No answer appears to 9th interrogatory.)

Sworn to and subscribed before me this the 7th day of April, 1880.

J. C. STANTON.

We nominate W. L. Eakin, Esq., of Chattanooga, Tennessee, as commissioner to take the deposition of said witness, J. C. Stanton.

H. M. SOMERVILLE AND
TERRY & LANE,
Attorneys for Defendant Jackson.

THE STATE OF ALABAMA, }
Jefferson County. }

Before me, R. C. Bradley, clerk of the circuit court of the said county, personally appeared A. O. Lane, one of the attorneys of record for J. F. B. Jackson, defendant in above cause, who, being duly sworn, deposes and says that John C. Stanton, the witness named, is a material witness for said defendant Jackson in the said cause, and resides out of the State of Alabama, to wit, in the city of Chattanooga, in the State of Tennessee.

A. O. LANE.

Sworn to and subscribed before me this 23d day of February, A. D. 1880.

R. C. BRADLEY, *Clerk.*

To John Doe, *ex dem.* Swann & Billups, plaintiffs in said cause, or their attorneys of record, Messrs. Rice & Wiley:

You will take notice that we have this day filed with the clerk of the circuit court of said county, in his office, the foregoing
356 interrogatories to be propounded to and answered by John C. Stanton, a material witness for the defendant J. F. B. Jackson in the said cause; that we have nominated W. L. Eakin as commissioner to take the depositions of said —— ——, the witness; and said Eakin, the commissioner, resides at Chattanooga, in the State of Tennessee.

H. M. SOMERVILLE AND
TERRY & LANE,
Attorneys for Defendant Jackson.

STATE OF TENNESSEE, }
Hamilton County. }

I, William L. Eakin, commissioner appointed in and by virtue of the foregoing commission, certify that I caused John C. Stanton to come before me; that I wrote his answers to all the foregoing interrogatories and read them over to him; that he assented to them; that I swore him to them, and he did swear to them in my presence and were subscribed in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of such witness; that I am not of counsel or akin to either of the parties to this suit or interested in the result thereof, and I enclose the commission, interrogatories, and answers to the clerk of court whence the same emanated as my full execution of this commission.

Given under my hand and seal this 7th day of April, 1880.

W. L. EAKIN,
Commissioner.

D. B. MILLER
vs.
JNO. SWANN, Trustee, *et al.*

In this cause, on motion of complainant, it is ordered that the testimony heretofore taken be, and the same is hereby, published, and, the parties announcing themselves ready for trial, this cause is set for the 26th day of May, 1885.

357 In Chancery, at Birmingham, Alabama.

MILLER
vs.
SWANN *et al.* } Agreement of Counsel as to Evidence.

It is agreed that the chancellor may disregard any and all illegal or irrelevant testimony without any specific objection being made thereto by the parties on either side, but the parties here call attention to such parts of the evidence as each may deem illegal or irrelevant.

May 26th, 1885.

WATTS & SON AND
O. W. UNDERWOOD,
For Complainant.
SAMUEL F. RICE,
Solicitor for Swann & Billups.

D. B. MILLER
vs.
JOHN SWANN, Trustee, *et al.*

This cause, coming on to be heard, was submitted in behalf of the complainant upon bill and exhibits thereto and exhibit to answer (Gov. Houston's deed) depositions of D. J. Duffy, J. C. Stanton, D. N. Stanton, John Demerritt, Ellis Phelan, Anthony Beers, Bayliss E. Grace, Sr., James Thomas, George Massey, J. E. Hawkins, Ephraim Murphy, L. H. Scruggs, W. F. Hanby, transcript from probate court of Jefferson county, Ala., in the matter of insolvency, and petition for sale of lands of estate of Joab Bagley, act incorporating N. E. & S. W. Ala. R. R. Co. and the Wills Valley Railroad Company and all acts relating to the Alabama & Chattanooga Railroad Company mentioned or referred to in the bill and answers, decree *pro confesso*
358 against defendant Phelan; also agreement of counsel and certified copy of writ of ejectment from circuit court of Jefferson county, Alabama, in the case of Doe *ex dem.* State of Alabama, John Swann, & John A. Billups *vs.* Lawson Morrow and George B. Randolph, and in behalf of the defendants upon demurrer and answer of John Swann and John A. Billups and the answers of all the other defendants except Phelan, and upon motion of said Swann & Billups to dismiss for want of equity the bill of complaint so far as it seeks relief as to the S. E. ¼ of the S. E. ¼ of section 1, township 18, range 3 west, Jefferson county, Alabama, and upon the following evidence: Deposition- of Robert Goode, Mrs. M. J. Kilgore, Henry Morrow, Richard C. Bearden, W. F. Nabers, Pleasant H. Watkins, George B. Randolph, John N. Jenkins, F. Y. Anderson, John J. White, E. L. Milner, H. L. Wheeler, and W. H. Hunter; also an agreement of counsel, the Deed Book, volume 21, pages 498–'9, 500–'1, belonging to the office of the judge of probate of Jefferson county, Alabama, and in which deeds were recorded in that office; deposition of J. C. Stanton, taken in an action of ejectment in the circuit court of Jefferson county, Alabama, wherein said Swann & Billups were plaintiffs and James A. Curry, J. F. B. Jackson, and J. M. Haygood were defendants. This last-mentioned deposition was taken by W. L. Eakin, as commissioner, on the 7th day of April, 1880, and returned by him, the said commissioner, to said court and filed therein.

In Chancery, at Birmingham, Spring Term, 1885.

D. B. MILLER
vs.
JOHN SWANN & JOHN A. BILLUPS, Trustees, *et al.*

This cause is submitted, in behalf of complainant, upon bills and exhibits thereto and exhibit to answer (Gov. Houston's
359 deed): depositions of D. J. Duffey, J. C. Stanton, D. N. Stanton, John Demerritt, Ellis Phelan, Anthony Beers, Bayliss E. Grace, Sr., James Thomas, George Massey, J. E. Hawkins, Ephraim

Murphy, L. H. Scruggs, W. F. Hanby; transcript from probate court of Jefferson county, Alabama, in the matter of insolvency and petition for sale of lands of estate of Joab Bagley; act incorporating N. E. & S. W. Ala. R. R. Co. and the Wills Valley Railroad Company, and all acts relating to the Alabama & Chattanooga Railroad Company mentioned or referred to in the bill and answer; decree *pro confesso* against defendant Phelan; also on agreements of counsel and certified copy of writ of ejectment from circuit court of Jefferson county, Alabama, in the case of Doe *ex dem.* State of Alabama, John Swann, & John A. Billups *vs.* Lawson Morrow and George B. Randolph.

E. L. CLARKSON, *Register.*

And in behalf of the defendant- upon demurrers and answers of defendants John Swann & John A. Billups and the answers of all the other defendants except Phelan, and upon motion of said Swann & Billups to dismiss for want of equity the bill of complaint so far as it seeks relief to the S. E. ¼ of S. E. ¼ of section 1, township 18, range 3 west, Jefferson county, Alabama, and upon the following evidence: Depositions of Robert Goode, Mrs. M. J. Kilgore, Henry Morrow, Richard C. Bearden, W. F. Nabers, Pleasant H. Watkins, George B. Randolph, John N. Jenkins, F. Y. Anderson, John J. White, E. L. Milner, H. L. Wheeler, and W. H. Hunter; also on agreements of counsel, the Deed Book, volume 21, pages 498–'9, 500–'1, belonging to the office of the judge of probate of Jefferson county, Alabama, and in which deeds were recorded in that office; deposition of J. C. Stanton, taken in an action of ejectment in the circuit court of Jefferson county, Alabama, wherein said Swann &
Billups were plaintiffs and James A. Curry, J. F. B. Jackson,
360 and J. M. Haygood were defendants. This last-mentioned deposition was taken by W. L. Eakin, as commissioner, on the 7th day of April, 1880, and returned by him, the said commissioner, to said circuit court and filed therein.

E. L. CLARKSON, *Register.*

Upon the foregoing note of testimony is endorsed the following: Filed in open court this the 26th day of May, 1885.

E. L. CLARKSON, *Register.*

D. B. MILLER
vs.
JOHN SWANN *et al.*

The bill in this case was filed to perfect title to certain tract- of land lying in this county, which are particularly described in this bill. It is admitted by both bill and answer that the tract- of land referred to were a part of the lands granted by Congress to the State of Alabama in trust for the use of certain railroads, being in what was known as the overlapping district. They were the common property of the several railroads interested, but by a division made these particular lands were set apart to the Alabama & Chattanooga

railroad. In the year 1870 and 1871 one Daniel J. Duffey, acting as the agent of the Alabama & Chattanooga Railroad Company, under an irregular appointment of the railroad's and with knowledge of the authorities in control of said railroads, established an office for the sale of lands thus donated or granted by the Congress of the United States, and sold these particular land to one Joab Bagley. The first sale was made on the 13th of September, 1870, when the mineral interest in said lands were reserved, and on the 24th of January, 1871, the mineral interest was released, and
361 on the latter date forty acres were sold to Joab Bagley, without reservation, for two dollars and a half per acre, and one-fourth was paid in cash and the balance was payable at one, two, and three years, with interest. In the instrument given to Bagley it is claimed that there are — and alteration, which, under the explanatory evidence, I think amounts to but little and which I will not discuss. It is in evidence that the money received by Duffy from Bagley and the notes were turned over to Henry E. Waite, the local treasurer of the A. C. R. R. On the 27th day of January, 1871, Joab Bagley and wife sold and conveyed to the McKee-Fuller Co. 160 acres, and on the 7th of October, 1871, Bagley and wife sold to McKee, Thomas & Co. forty acres. The different conveyances by which the right of complainant are divided are set out in the bill. It would be an unnecessary consumption of time for me to refer to the several acts of Congress granting these lands or the legislative joint resolution of 1857–'8 transferring said lands to the railroad companies. They are fully set out in the case of Swann & Billups *vs.* Lindsey, 70 Ala., page 507. The right and power vested in the State are there fully discussed and determined. It is not my purpose to review the authorities cited and read by the learned counsel for the complainant and the defendant. I purpose merely to give the conclusion that I have arrived at without reason for those conclusions. The appointment of Duffey as land agent was without authority of law. He could not be appointed as agent to sell and convey the lands except by the vote of the directors on the managing board, in whom the power to sell was reposed by charter or by the general law. Standifer *vs.* Swann & Billups, in MSS. Neither did the railroad corporation or the State of Alabama have the power to sell and convey except under the terms, stipulations, and conditions of the grant, and hence the legal authority to sell and convey was not or could not be vested in Duffey to sell these lands at the
362 time he sold them. The grant of these lands by Congress was for a specific purpose, and the mode and manner of sale was prescribed. If Congress has seen proper to do so a perfected reversion of the lands could have been had on account of the violations of the terms and conditions of the grant. Congress or the United States not having seen reason to enforce a forfeiture or a reversion on that ground no one else had a right to do so. 21 Wall., page 63, Schulenberg *vs.* Harriman.

Neither Congress of the United States nor the Government of the United States having objected to the mode of sale and the legal title being in trust for the Alabama & Chattanooga Railroad Company,

would be held to have ratified the acts of Duffey, who assumed to be the agent of the company, and with the knowledge of the fact that he was selling and conveying of the said land and by receiving part of the proceeds and retaining the unpaid notes, and such knowledge and such acts amounts to an equitable estoppel.

Standifer *vs.* Swann & Billups, in MSS.

The railroad (A. & C. R. R.) was completed between 1868 and June, 1870. 10 Ak., 510. It is a matter of public history and an admitted fact in the case that the State of Alabama took a mortgage on the road and on the lands to secure the issue of the two million dollars straight bonds, and that by the foreclosure of the mortgage the State became the beneficial owner and holder of the lands granted by Congress. On the 8th of February, 1877, the State of Alabama, by George S. Houston, as governor, conveyed the lands embraced in her mortgage to John Swann and John A. Billups, as trustees, under and in pursuance of the provisions of the act approved February 23d, 1876. The lands in controversy in this suit formed a part of those conveyed. *Bona fide* purchaser of these lands for value was specially protected by the acts of the legislature from time to
363 time—see Acts of 1872–'3, page 53, section 4—and especially by the act approved February 10th, 1876. An act to execute the power of disposal of the lands granted by an act of Congress, etc., page 159, section 3 of Acts of 1875–'6; also page 146, section 19.

By this latter act the power is given to the trustees to sue for and recover lands, etc., which are held under fraudulent sale, and especially provides as follows: "But when sales of said lands or any portion thereof have heretofore been made to purchasers in good faith under the authority reserved to said railroad company, etc., such trustees shall make title thereto where not already made, but shall collect the purchase-money, etc., and shall be entitled to all the securities for the payment thereof." So also by the act of the legislature in execution of the power to convey, 1882–'3, page 64, section 1. This important proviso is embraced in the act, "That nothing contained in this act shall be construed to impair or affect any existing legal or equitable right of any purchaser who purchased any portion of said lands in good faith," etc. Mr. Duffy has established what he called an entry taker's office in the place and in the building occupied by the railroad officials. There he opened his books and sold the lands without legal authority, with the knowledge of the railroad officials and of the governor of Alabama, who visited his office, was introduced by John C. Stanton, the general superintendent of the railroad. All the mode and manner in which Duffy conducted the sales were explained to him—see Duffey's answer to 7th interrogatory. Other officials of the State visited and examined this department. In addition to this, Duffey published in the daily newspaper published at Chattanooga a notice to the public, which was continued for months, notifying all parties desirous of purchasing land of the Alabama & Chattanooga Railroad Company to call upon D. J. Duffy — and answer to 3d interrogatory. In the meantime Joab Bagley purchased these

lands, paid part of the purchase-money, and executed his
364 notes for the remainder. For aught this court knows, the amount of cash paid by him and the notes executed were appropriated towards the building of the road, the object for which the lands were granted by Congress. If a corporation exercised powers not *confined* by its charter, they are subject, on proper proceedings, to a forfeiture of its privileges and franchises, or any stockholder could restrain the diversion of corporate funds or property for any purpose not embraced in the original purposes of the corporation. I am of the opinion that the purchase by Joab Bagley was made in good faith, without any intention whatever of doing wrong, and that the Alabama & Chattanooga Railroad Company and their assignees and the State of Alabama, by her legislative acts in the premises, are estopped from any proceedings by herself or her assignees, the said Swann & Billups, from now questioning the validity of the sales to Bagley. The complainant should pay the unpaid purchase-money, because the vendor's lien is fastened upon the land. Swann & Billups are entitled to this—no more and no less. Upon the payment of the purchase-money which is due upon the notes the complainant will be entitled to the conveyance of the lands and a reference will be ordered to ascertain the amount due on said notes.

Enroll this decree.

This cause coming on to be heard was submitted upon the pleadings and proof, as noted by the register, and was argued by counsel, and, being duly considered, this court ordered, adjudged, and decreed as follows:

1. That the complainant is entitled to the relief prayed for in the bill, and the motion to dismiss the bill for want of equity is not well taken and is overruled.

2. That the exceptions to the testimony filed by the complainant the 26th day of May, 1885, are each well taken and sustained.

365 3. That the exceptions to the testimony filed by the defendants are well taken and are sustained.

4. That it be referred to the register of this court, to ascertain and report how much is due on the unpaid notes of Joab Bagley referred to in the bill for the purchase-money of the lands therein described. In executing the reference he may examine witnesses orally by deposition and refer to the legal testimony on file, giving notice of the time and place to the counsel on both sides. All other questions are reserved until the coming of the report.

June 20th, 1885.

THOMAS COBBS, *Chancellor.*

Endorsed on the foregoing is the following: Filed and enrolled this the 22d day of June, 1885. E. L. Clarkson, register.

To the register of the chancery court of Jefferson county, in the State of Alabama:

Your petitioners, John Swann & John A. Billups, trustees, etc., respectfully state: At the May term, 1885, of said chancery court of

Jefferson county, Alabama, a decree bearing date June 20th, 1885, was rendered by the Hon. Thomas Cobbs, the chancellor, then presiding in and holding said May term, 1885, of said chancery court, in the cause of D. B. Miller *vs.* John Swann *et al.*, which decree so rendered in said court remains on file in said court, and that your petitioners, with other persons, were and are defendants in said cause. Your petitioners (in behalf of themselves, as well as in behalf of the other defendants in said cause), intending to take an appeal from said decree to the next term of the supreme court of Alabama and to supersede the execution of said decree, do hereby apply to you for such appeal, as well as for directions and
366 fixing by you of the amount and condition of the appeal bond, so that said appeal, when taken, and when the appeal bond, the amount and condition of which is to be directed by you, shall have been executed and shall as executed have been approved by you, shall operate as a supersedeas of said decree.

JOHN SWANN &
JOHN A. BILLUPS, *Trustees.*
By their solicitors, RICE, HEWITT & WALKER.

The foregoing petition of John Swann and John A. Billups, trustees, etc., having been this day filed with me, as register of said chancery court of Jefferson county, Alabama, as an application to me to direct the amount and condition of the appeal bond in the cause mentioned in said petition, so that such bond, when executed pursuant to such direction by me and when approved by me, may operate as a supersedeas of said decree mentioned in said petition, now I, E. L. Clarkson, register of said chancery court, as such register do hereby order and direct that the amount of said bond shall be six hundred dollars, and that the condition of said bond shall be to prosecute the said appeal to effect and to satisfy such judgment or decree as the said Supreme Court may render in the premises.

This 9th day of July, 1885.

E. L. CLARKSON,
Register in Chancery.

On the foregoing is endorsed the following: Filed in office this 9th day of July, 1885. E. L. Clarkson, register.

367 THE STATE OF ALABAMA, }
Jefferson County. }

Know all men by these presents that we, John Swann and John A. Billups, as trustees, etc., and their surety, F. Y. Anderson, are held and firmly bound unto D. B. Miller in the sum of six hundred dollars; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, but upon condition that if the above-bound John Swann and John A. Billups, as trustees, etc., shall prosecute to effect an appeal by them taken this day to the next December term,

1885, of the supreme court of Alabama from a decree rendered against them in favor of said D. B. Miller by the chancery court in and for said county on the 20th day of June in a cause pending in said chancery court, wherein said D. B. Miller is the complainant and said John Swann and John A. Billups, as trustees, etc., and others are defendants; or, if they fail in said appeal, shall satisfy such judgment or decree as may be rendered against them by the said supreme court of Alabama, then in either of said events this obligation to be void; otherwise to remain in full force and effect; and for the payment of the above bond we hereby waive our right of exemption to personal property under the constitution and laws of the State of Alabama.

Given under our hands and seals this the 9th day of July, 1885.

JOHN SWANN, [L. S.]
JOHN A. BILLUPS, [L. S.]
Trustees,
By F. Y. ANDERSON.
F. Y. ANDERSON. [L. S.]

Approved this 9th day of July, 1885.

E. L. CLARKSON, *Register.*

368 On the foregoing is endorsed the following: Filed in office this the 9th day of July, 1885. E. L. Clarkson, register.

THE STATE OF ALABAMA, }
Jefferson County. }

I, E. L. Clarkson, register in chancery for the eighth district of the western chancery division of Alabama, at Birmingham, Alabama, hereby certify that the foregoing pages, from — to —, inclusive, contain a full and complete transcript of the record and proceedings of the chancery court of said district (for said county, at Birmingham, Alabama) in a cause therein pending, wherein D. B. Miller was complainant and John Swann and John A. Billups *et al.*, defendants; and I further certify that the said defendants, John Swann and John A. Billups, did on the 9th day of July, 1885, pray an appeal to the supreme court of Alabama, which appeal was granted upon their giving bond conditional if they fail in said appeal, to satisfy such judgment or decree as may be rendered against them by the supreme court of Alabama, and that F. Y. Anderson is the surety on said bond as aforesaid.

In testimony of all of which I, the said register in chancery, hereunto set my hand as such register and affix hereto the seal of the said chancery court this the 12th day of December, 1885.

E. L. CLARKSON,
Register in Chancery.

369 Supreme Court of the State of Alabama, December Term, 1888.

TUESDAY, *December 4th*, 1888.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law, at the capitol, in the city of Montgomery, on Tuesday, the 4th day of December, A. D. eighteen hundred and eighty-eight, it being the first Tuesday of the said month.

Present and presiding as judges of the said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice.

SUPREME COURT, THURSDAY, *May 2d*, 1889.

Jefferson Chancery Court.

D. B. MILLER
vs.
JOHN SWANN, Trustee, *et al.* } 6 Div. 857.

In this cause, the death of the appellant being suggested and shown to the court, it is ordered that leave be granted to revive the suit in the names of the proper parties when made known.

Supreme Court of the State of Alabama, November Term, 1889.

TUESDAY, *November 5th*, 1889.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law, at the capitol, in the city of Montgomery, on Tuesday, the fifth day
370 of November, A. D. eighteen hundred and eighty-nine, it being the first Tuesday of the said month.

Present and presiding as justices of the said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice; Hon. Thomas N. McClellan, associate justice.

SUPREME COURT, MONDAY, *December 9th*, 1889.

Jefferson Chancery Court.

D. B. MILLER
vs.
JOHN SWANN *et al.*, Trustees. } 6 Div. 857.

Come the appellant, by attorney, and moves the court to revive said suit, and said motion is submitted for decision.

SUPREME COURT, TUESDAY, *December 10th*, 1889.

Jefferson Chancery Court.

D. B. MILLER
vs.
JOHN SWANN *et al.*, Trustees. } 6 Div. 857.

Come the parties, by attorneys, and argue and submit this cause for decision.

SUPREME COURT, FRIDAY, *May 2d*, 1890.

371 Jefferson Chancery Court.

D. B. MILLER
vs.
JOHN SWANN *et al.*, Trustees. } 6 Div. 857.

Come the parties, by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of said chancery court there is no error. It is therefore considered that the decree of said chancery court be in all things affirmed. It is also considered that the appellant and John Phelan, Ellis Phelan, and James E. Hawkins, sureties on the appeal bond, pay the costs of appeal in this court and in the chancery court.

372 Supreme Court of Alabama, November Term, 1889.

D. B. MILLER
vs.
JOHN SWANN, Trustee, &c. } 6 Div. 857.

Appeal from Jefferson chancery court.

SOMERVILLE, *J.*:

This case has once before been decided by this court, at a former term. The facts of the case remain essentially unchanged. The chancellor now decides that there is nothing in the amended bill or in the additional testimony which takes the case out of the operation of the former decision as it appears reported under the title of Swann & Billups *vs.* Miller, 82 Ala. Rep., 530.

The decree might well be affirmed upon the authority of that case. The printed argument filed in the case by the able counsel of the appellant and his oral argument at the bar are but reproductions of the one filed on his application for a rehearing on the former appeal. This argument was then considered by us, and we saw nothing in it which, in our judgment, required us to modify or recant the opinion then announced.

In view of the importance of the questions raised and the magnitude of the interests involved, however, we have held the cause

up for further examination in the light of one or more recent decisions of the Supreme Court of the United States which are asserted to bear on the subject in dispute.

The contest of title is between Swann & Billups, on the one hand, who derive their interest in the land from the State, and Miller, on the other, who claims, through one Bagley, under the Alabama & Chattanooga Railroad Company. The common source of
373 title is admitted to be the State, the lands in controversy being a portion of those granted to the State of Alabama by the act of Congress approved June 3d, 1856 (11 U. S. Stat. at Large, pp. 17, 18), to aid in the construction of certain railroads in this State. This grant was renewed and extended by another act of Congress, approved April 10th, 1869 (16 U. S. Stat. at Large, pp. 45, 46).

Much time and space may be saved by disposing of some points urged in the argument of appellant's counsel, as to which there can be no room for reasonable controversy.

So far as the question of forfeiture is concerned, it may be admitted that if the railroad company had the authority to sell the lands, and did so prior to the legally authorized time, the condition violated would be a condition subsequent, and no one could take advantage of the violation of a condition subsequent except the United States Government. The rule is unquestionable that ordinarily no one but the grantor or his heirs or successors can set up a failure to perform a condition subsequent.

The question of forfeiture does not, however, enter the case, as we view it. If there had been a forfeiture for violation of a condition subsequent and the Government had claimed the benefit of it, the title of Swann & Billups, as trustees, as well as that of the State under which they claimed, would be also divested. The plaintiffs in ejectment would have no title, and this fact would of itself defeat their action, unless the defendants were estopped to deny the fact by reason of claiming through the Alabama & Chattanooga Railroad Company, which corporation held under the State by grant and solemnly admitted its title by so holding and executing a mortgage back to the State on these lands to secure certain bonds loaned by the State to expedite the construction of the road. Acts 1869, 1870, pp. 89–92. The basis of the defense to the bill which
374 seeks to enjoin the ejectment suit is that the title of the plaintiffs in ejectment is good, and therefore there necessarily could have been no forfeiture. The only issue is whether such title has been divested by a lawful and authorized sale by the railroad company under the power conferred by the State and under the acts of Congress in question.

It has often been held in the numerous cases of this class which have come before this court for consideration as follows:

(1.) That the title to these lands was vested by Congress in the State, as trustee, for the purposes mentioned.

(2.) That the State had the right to transfer the lands to the railroad company, subject to the restrictions imposed by the acts of

Congress which made the grant, and that the transfer was subject to these restrictions on the grantee's power of disposition.

(3.) That the legal title to the lands was to remain in the State until the road was completed, which event occurred on May 17th, 1871, the State never having conveyed the legal title up to this time, unless to Swann & Billups, as trustees for the creditors.

(4.) That the State had no authority to sanction any sale of these lands except such as might be made in substantial compliance with the terms imposed by Congress, and that it has made no attempt to do so.

These propositions are fully supported by the decisions of this court and by those of the United States Supreme Court. Swann *vs.* Lindsey, 70 Ala., 507; Swann *vs.* Larmore, *ib.*, 555; S. C., 116 U. S., 198; Standifer *vs.* Swann, 78 Ala., 88; Ware *vs.* Swann, 79 Ala., 351; Swann *vs.* Miller, 82 Ala., 530; Swann *vs.* Gaston, 87 Ala., 569.

The interest in the lands claimed by the railroad company was derived from the State through the joint resolution of the General Assembly approved January 30th, 1858, granting them to certain railroads, under which corporations the Alabama & Chatta-
375 nooga road claims by privity of title. (Acts, 1857, '58, p. 430); Swann *vs.* Lindsey, 70 Ala., 507.

The railroad company on March 2d, 1870, mortgaged these lands back to the State, under the authority conferred by the act of the Alabama General Assembly approved February 11th, 1870. Acts 1869, '70, pp. 89–92. The sales to Bagley were made after the execution of this mortgage, and Miller claims no better title than Bagley acquired.

Unless the lien of the mortgage was released, it is manifest that the title acquired under it would be superior to that acquired from the mortgagor, or, in other words, that Swann & Billups' title would be superior to Miller's. Wilson *vs.* Boyce, 92 U. S., 320.

A mortgagor ordinarily has no power to sell the mortgaged property free of the incumbrance created by the mortgage. He may do so, however, if allowed by the contract of the parties, the rights of no creditors intervening, or he may be permitted to do so by express legislative authority. Such authority is claimed in this case.

The act of February 11th, 1870, expressly permits a "reservation" to be made by the railroad company in the mortgage to be executed to the State, providing that "the said Alabama & Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same." Acts 1869, '70, pp. 89, 90, sec. 1. This reservation was incorporated in the mortgage, and its construction, as applied to the facts of the case, is the controlling question for us to decide. The power retained by the mortgagor was not an unlimited power to sell. It was a power to sell only in accordance with the terms and conditions of the act of Congress making the grant, which, we have said in a former decision, was "a law as well as a grant." If these terms and conditions were followed, then the lien of the mortgage was by agreement to be released. If they were not

followed as to the mode or time prescribed or otherwise,
376 then the contract of the parties is that the lien of the mortgage is to remain unaffected. Compliance with the essential requirements of the act of Congress became thus a condition precedent to the divestiture of title out of the State as mortgagee. This, we repeat, was the express contract between the parties. It is sufficiently shown in the former opinion in this case that the attempt to sell to Bagley was in direct violation of the terms of the law of Congress, and therefore necessarily also in violation of the agreement of the parties to the mortgage, which was based on that law. Swann *vs.* Miller, 82 Ala., 530. The lien of the mortgage for this reason remained undischarged. This we understand to be the natural and just construction of the mortgage agreement and of the act of the Alabama General Assembly approved February, 1870, above cited. The case of St. Louis, Iron Mountain, &c., Railway Co. *vs.* McGee, 115 U. S., 469, is not, in our opinion, in conflict with the conclusion reached in this case. The question there discussed involved the construction of no mortgage or other contract between the State and the railroad to which the grant was made analogous to the one here construed, which governs the relative rights of the contracting parties.

The act of Congress conferring title to these lands, moreover, was not a mere grant. As said on the former appeal in this case, "It was a law as well as a grant." Swann *vs.* Miller, 82 Ala., 540. Its policy was to prohibit either the State or its grantees from selling any of these lands except in the mode and at the time authorized. Its prohibition was against such sales. An express act of the General Assembly attempting to legalize these sales would have been void for repugnancy to the letter and policy of the law. An agreement between the State and the railroad company having in view such a violation of the congressional statute would have been equally void. Can the actual doing of the illegal thing be less in-
377 valid than the agreement to do it, or than a law which is void because it purports to authorize it to be done? In Petit *vs.* Petit, 32 Ala., 288, this court properly held that a lease of lands belonging to an Indian reservation under a treaty with the Chickasaw nation was illegal and void because in violation of the provisions and policy of the treaty of 1832; and it was further held that it "was incapable of confirmation, because it falls within the influence of the general rule that a contract which is void, either by a positive law or upon principles of public policy, is deemed incapable of confirmation." We have once before so declared the law of this case, and we adhere to the conclusion reached. Swann *vs.* Miller, 82 Ala., 530, 540; Bishop on Contr., 542, 614, 620, 846; 2 Pom. Eq. Jur., 964.

There is another view of this question of ratification. No one could ratify the sale in question, except the State, so as to discharge the lien of its mortgage. This could be done only by legislative authority. Van Dyke *vs* State, 24 Ala., 81. The laws enacted on this subject protect only the titles of *bona fide* purchasers, and Bagley was not of this class. Swann *vs.* Miller, 82 Ala., 530, 540. The

receipt of the purchase-money for the lands by the officers of the railroad company was no estoppel to preclude the rights of the State.

One suggestion more. It is argued that inasmuch as the railroad was fully completed, the purposes of the act of Congress have been carried out, and this confers a strong equity on the purchaser of the land, which was a part of the fund intended for this trust. It may be answered that the equity of the State is the stronger, in view of the fact that the road was constructed with her bonds advanced to the company, for the security of which the very mortgage in controversy was given.

The decree of the chancellor is accordingly affirmed.

378 Know all men by these presents that we, Reuben B. Miller, Ellis Phelan, and French Nabers, are held and firmly bound unto John Swann and John A. Billups, trustees, in the full and just sum of one thousand dollars, to be paid to the said John Swann and John A. Billups, trustees, their heirs, executors, administrators, attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of October, 1890.

But to be void upon condition hereinafter stated, to wit: Whereas lately, at the December term, 1889, to wit, on the 2nd day of May, 1890, of the supreme court of Alabama, in a suit depending between Reuben B. Miller as executor of the estate of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Irving Miller, and Dudley Miller, heirs of said D. B. Miller, and others, stated on the docket of said supreme court of Alabama as D. B. Miller *et al.* against Swann and Billups, and the said Reuben B. Miller as executor as aforesaid and the said Reuben B. Miller and others, appellants in the supreme court of Alabama, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit and a citation directed to the said Swann and Billups, trustees, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden in the city of Washington, D. C., on the second Monday in October, 1890:

Now, the condition of the above obligation is such that if the said Reuben B. Miller and others, plaintiffs in error, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

REUBEN B. MILLER.
ELLIS PHELAN,
379 By E. A. GRAHAM,
Att'y-in-Fact.
FRENCH NABERS.

Sealed and delivered in the presence of—
THOS. SEAY.
T. H. WATT, SR.

Oct. 9th, 1890.

Approved by—
GEO. W. STONE,
C. J. Supreme Court of Alabama.

Filed October 9th, 1890.
JOHN W. A. SANFORD,
Clerk of Supreme Court of Alabama.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the December term, 1889, to wit, May, 1890, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Reuben B. Miller as the executor of D. B. Miller, deceased, and the said Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, the heirs of said D. B. Miller, *et al.*, plaintiffs in error, and John Swann and John A. Billups, trustees; W. J. Van Kirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry, defendants in error, wherein was drawn
380 in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute or of an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Reuben B. Miller, executor as aforesaid, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, heirs as aforesaid, *et al.*, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then — there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said

Supreme Court, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States,
2nd District of Alabama.

381 Allowed by—
GEO. W. STONE,
Chief Justice of the Supreme Court of Alabama.

Filed Oct. 9th, 1890.

JOHN W. A. SANFORD,
Clerk of the Supreme Court of Alabama.

382 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Swann and John A. Billups, trustees; W. J. Van Kirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Reuben B. Miller, executor of D. B Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Mille-, heirs of said D. B. Miller, and others are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of the State of Alabama, this 10th day of October, in the year of our Lord one thousand eight hundred and ninety.

GEO. W. STONE,
C. J. Sup. Ct of Ala.

Received in United States marshal's office October 16th, 1890.

A. R. NINNINGER,
U. S. Marshal.

On this 5th day of November, in the year of our Lord one thousand eight hundred and ninety, personally appeared Robert Chartson, before me, the subscriber, W. H. Hunter, a United States commissioner for the northern district of Alabama, and makes
383 oath that he delivered a true copy of the within citation to David D. Smith, of the firm of Smith & Lowe, attorneys, at Birmingham, Ala., on the 18th day of October, A. D. 1890, and further by delivering a true copy to John A. Billups, at Carrollton, Pickens county, Ala., on the 3d day of November, A. D. 1890.

ROB'T CHARTSON.

Sworn to and subscribed the fifth day of November, A. D. 1890.
W. H. HUNTER,
U. S. Commissioner.

Filed November 11th, 1890.
JOHN W. A. SANFORD,
Clerk of the Supreme Court of the State of Alabama.

384 THE STATE OF ALABAMA, }
Montgomery County. }

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 383, inclusive, contain a full, true, complete, and perfect transcript of the record and proceedings of the said supreme court in the cause, lately pending in said court, wherein D. B. Miller was appellant and John Swann *et al.*, trustees, &c., were appellees, and that the writ of error hereunto attached is the original writ issued, allowed, and filed in the office of the clerk of said supreme court, and that the citation hereto attached was issued and return of execution of said citation filed in said office of the clerk of said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Montgomery, in said State of Alabama, on the fourteenth day of November, A. D. eighteen hundred and ninety.

[Seal of the Supreme Court of Alabama.]

JOHN W. A. SANFORD,
Clerk of the Supreme Court of the State of Alabama.

385 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you at the Dec'r term, 1889, to wit, May, 1890, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Reuben B. Miller as the executor of D. B. Miller, deceased, and the said Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, the heirs of said D. B. Miller, *et al.*, plaintiffs in error, and John Swann and John A. Billups, trustees; W. J. Vankirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was

drawn in question the construction of a clause of the Consti-
386 tution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Reuben B. Miller, executor as aforesaid, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, heirs as aforesaid, *et al.*, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety.

J. W. DIMMICK,
Clerk of the Cir. Court of the United States, 2nd Dist. of Ala.

Allowed by—
GEO. W. STONE,
Chief Justice Supreme Court of Alabama.

387 [Endorsed:] Filed Oct. 9th, 1890. John W. A. Sanford, clerk of the supreme court of Alabama.

388 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Swann and John A. Billups, trustees; W. J. Vankirk, John N. Jenkins, E. A. Taylor, & Julia B. Berry, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, heirs of said D. B. Miller, and others are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of the State of Alabama, this 10th day of October, in the year of our Lord one thousand eight hundred and ninety.

GEO. W. STONE,
C. J. Sup. C't of Ala.

389 On this 5th day of November, in the year of our Lord one thousand eight hundred and ninety, personally appeared Robert Chartson before me, the subscriber, W. H. Hunter, a United States commissioner for the northern district of Alabama, and makes oath that he delivered a true copy of the within citation to David D. Smith, of the firm of Smith and Lowe, att'ys, at Birmingham, Ala., on the 18th day of October, A. D. 1890, and further by delivering a true copy to John A. Billups, at Carrollton, Pickens county, Ala., on the 3rd day of Nov., A. D. 1890.

ROB'T CHARTSON.

Sworn to and subscribed the fifth day of November, A. D. 1890.
W. H. HUNTER,
U. S. Commissioner.

Actual Expenses in Lieu of Mileage.

R. R. fare, Tuscaloosa and return	$3 12
Conveyance, " to Carrollton and return	12 00
Subsistence, 3 days, Nov. 2nd, 3rd, and 4th	6 00
Service of two citations @ $2.00 each	4 00
	$25 12
Cr. by cash	20 00
Balance	$5 12

[Endorsed:] Citation. Filed Nov. 11th, 1890. John W. A. Sanford, clerk of the supreme court of the State of Alabama. Received in U. S. marshal's office October 16th, 1890. A. R. Nininger, U. S. marshal.

390 *Assignment of Errors.*

And now come the plaintiffs in error and say that in the record and proceedings of the supreme court of Alabama there hath intervened to their injury manifest error, and they assign for error:

1st. That the supreme court of Alabama erred in affirming the decree of the chancellor.

2d. That the said supreme court of Ala. erred, in that the plaintiffs in error were not entitled to relief.

3d. That the supreme court of Alabama decided that Swann & Billups were entitled to the lands in controversy.

4. That the supreme court of Alabama erred in its construction of the acts of Congress named in the pleadings.

5. That the supreme court of Alabama erred in its construction of the said acts of Congress as applicable to the facts disclosed in the record.

T. H. WATTS, SR.,
Att'y & Sol. for Pl'tffs in Error.

Endorsed on cover: Case No. 14,435. Alabama supreme court. No. 623. Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, heirs of D. B. Miller, *et al.*, plaintiffs in error, *vs.* John Swann and John A. Billups, trustees; W. J. Vankirk, John N. Jenkins, E. A. Taylor, & Julia B. Berry. Filed December 4, 1890.

Office Supreme Court U. S.
FILED.
OCT 23 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

Term No. ~~623.~~ 362

REUBEN B. MILLER ET AL

vs.

JOHN SWANN AND JOHN A. BILLUPS,
TRUSTEES, AND OTHERS.

Brief of Ellis Phelan, Attorney for Plaintiffs in Error.

Supreme Court of the United States.

Term No. 623.

REUBEN B. MILLER ET AL

vs.

JOHN SWANN AND JOHN A. BILLUPS,
TRUSTEES, AND OTHERS.

Brief of Ellis Phelan, Attorney for Plaintiffs in Error.

STATEMENT OF THE CASE.

On the 18th July, 1884, D. B. Miller, a citizen of Covington, Kentucky, filed his bill in the Chancery Court of Jefferson County, Alabama, against John Swann and John A. Billups, Trustees, and others, and sought to obtain a title to certain real estate, situated in said County of Jefferson, which he and his vendors had purchased from the Alabama and Chattanooga Railroad Company, a Corporation formed by a consolidation, under the authority of the State of Alabama, of the Wills Valley Railroad Company, and the North East and South West Alabama Railroad Company, thus forming a continuous line from the Alabama State line on the east in the direction of

Chattanooga, Tenn., to the Mississippi line southwesterly in the direction of Meridian, which real estate formed a part of the lands granted to the State of Alabama, by the act of Congress, approved June 3, 1856, and the act of April 10, 1869, renewing the grant to the Alabama and Chattanooga R. R. Co.

The land was included in what is known as the overlapping district, and was by the Commissioners, appointed by the State of Alabama, set over to the Alabama and Chattanooga R. R. Co., as the successor of the N. E. & S. W. Ala. R. R. Co. (See deposition of L. H. Scruggs, record, pages 138, 141, 142). Opinion of Chancellor Cobbs, pages 233, etc.

The acts of incorporation and consolidation of the two above-named railroad corporations, into the Alabama and Chattanooga Railroad Company, are particularly referred to in the bill and in the record, and no point or question is raised as to their regularity, that being conceded on all sides.

The complainant averred in his bill, especially in his amendment, found on pages 2 and 3 of printed record, that he and his vendors having purchased this land from the Alabama and Chattanooga Railroad Company, in good faith and in accordance with the true intent and spirit of the grant of Congress, and having paid part of the purchase in cash, at the time of purchase, he was entitled to a title upon paying the balance of the purchase money, if there was any found due.

The following acts of the Legislature of the State of Alabama, viz: The act to loan the credit of the State of Alabama to the Ala. & Chatt. R. R. Co., found on pages 89, 90, 91, and 92 of the acts of 1869–70;

"The Debt Settlement Act" approved February 28, 1876, on pages 130 to 149, acts 1875–6, also the act approved February 20, 1883, on pages 62, 63, 64, and 65, acts 1882–3, are mentioned and described in the complainant's bill and are noted in the minute entry, July 14, 1888, page 10 of printed record.

The different conveyances, including the two certificates of Daniel J. Duffy, the agent of the Ala. & Chatt. R. R. Co., called "Entry Takers" certificates, to Joab Bagley are all particularly set out as exhibits to the original bill (record, pages 40 to 69), except the deed of Governor George S. Houston to Swann and Billups, Trustees, which is set out as exhibit 20 to their answer. (Record, page 75). Exhibit F, deed of James H. McKee and wife and others, to Jefferson Iron Co., is not in this record, but it is described in paragraph 7 of the original bill. (Record, page 43).

There is an agreement in the record, pages 152–3, in regard to the bankruptcy proceedings against the Ala. & Chatt. R. R. Co., by which the title of the State to these railroad lands was further strengthened.

The cause was submitted to the Chancellor, Hon. Thomas Cobbs, on the bill, exhibits, answers, etc. (record, pages 232 and 233), and on the 20th of June, 1885, he decided the case in favor of the complainant (pages 233 to 236), and thereupon Swann and Billups took an appeal to the Supreme Court of Alabama, pages 237 to 238.

The Supreme Court of Alabama reversed this decree of the Chancellor, and remanded the cause. This decree of reversal is not in this record. The opinion, however, is reported in 82 Ala. Reports, page 530, and it is referred to in the opinion of Judge Somerville

(on page 240 of this record) on the second appeal, and it fully appears that the Supreme Court of Alabama reversed the above decree of Chancellor Cobbs, and remanded the cause.

Thereupon the complainant, D. B. Miller, amended his bill, and more pointedly averred that the Joab Bagley purchase was made in accordance with the acts of Congress, granting this land to the Alabama & Chattanooga R. R. Co., and that the railroad had been completed to a point opposite to and beyond the lands so purchased, at the date of the purchase, and also averred the completion of the railroad on May, 17, 1871. (Record, pages 2 and 3).

This latter fact had been judicially declared and held by the Supreme Court, in its opinion on the first appeal. (82 Ala., 530).

The complainant thereupon took the deposition of Albert F. Thayer, the old Secretary of the Ala. & Chatt. R. R. Co., and retook the depositions of John C. Stanton and Daniel J. Duffy. (Pages 11 to 38 of record).

The cause was again submitted to the Chancellor, Thomas Cobbs (see minute entry, July 14, 1888, pages 10 and 11 of record), and on the 12th Nov., 1888, he rendered his final decree, dismissing complainant's bill, holding that there was nothing in the amendment and the additional testimony that releived the case from the effect of the decision of the Supreme Court on the first appeal, 82 (not 80) Ala., 530. (Record, page 38).

Thereupon the complainant, D. B. Miller, appealed to the Supreme Court of Alabama. (Record, pages 39 and 40).

Pending the appeal in the Supreme Court of Alabama, D. B. Miller died, and the cause was revived in the name of his executor and heirs, (so held on motion of John A. Billups, Trustee, to dismiss the writ of error).

The Supreme Court of Alabama adhered to its former ruling in the cause, and affirmed the decree of the Chancellor, dismissing the bill (record, pages 240 and 241), and the executor and heirs brought the case to the Supreme Court of the United States by writ of error.

It is well to note the manner in which the record is made up.

An agreement was entered into as to what proceedings should be included in the second appeal (record, pages 38 and 39), and this, with the former record of the cause on the first appeal was to constitute the record of the cause on the second appeal, in the Supreme Court of Alabama. The printed record from the minute entry, Nov. 7th, 1887, on page 1, down to and including the certificate of Charles A. Senn, Register, on page 40, contains the new matter on the second appeal, carried up and attached to the record on the first appeal, and the proceedings or record on this first appeal commence on page 40 and end at the bottom of page 238.

The proceedings had in the Supreme Court of Alabama, on this second appeal, commence on page 239 of printed record.

The Supreme Court on the second appeal adhered to its former ruling as expressed in its opinion, reported in 82 Ala., 530, and affirmed the decree of the

Chancellor. The opinion of the Court is found on pages 240 to 244, of printed record.

ASSIGNMENT OF ERRORS.

The plaintiffs in error have assigned five separate grounds of error, but they are all embodied, in fact, in the fourth and fifth, viz: That the Supreme Court of Alabama put a wrong construction on the acts of Congress, granting land to aid in the construction of the Ala. & Chatt. R. R. Co., as applicable to this case. (Record, page 249).

ARGUMENT.

I.

The plaintiffs in error contend that they and their vendors purchased the land in controversy, "under a lawful and authorized sale by the railroad company, under the power conferred by the State and under the acts of Congress in queston." (Quotation from opinion of Somerville, J., page 241). This is the issue fairly and squarely made by this record,

In the light of the more recent cases of the St. Louis, Iron Mountain & Southern Railroad vs. McGee, 115 U. S., 320, and Doe *ex. dem*, Swann & Billups vs. Larrmore, 116 U. S., 198, the plaintiffs in error feel confident in saying that the opinion delivered by the Chancellor, Thomas Cobbs, when he firs = decided this

case, is the proper construction of the law of this case. (Record, pages 233 to 236). They contend that the testimony of Albert F. Thayer relieves the case from the imputation that Daniel J. Duffy's appointment as agent of the Ala. & Chatt. R. R. Co. was irregular, especially his answer to interrogatory 5th, on page 28 of record, and the two letters of his addressed to Daniel J. Duffy, page 22.

The plaintiffs in error have investigated the record in the McGee case, and the Acts of Missouri relating to the railroad grant, and they confidently beleive that the case at bar appeals more strongly in favor of their title, as against the State of Alabama, than the McGee title did as against the State of Missouri. The railroad grants are almost indentical. The State of Missouri designated the Cairo & Fulton Railroad Co. as the beneficiary of the lands granted by Congress.—Public Laws of Missouri, 1855, pages 314 to 317. The State of Alabama designated the N. E. & S. W. Ala. R. R Co. (Ala. & Chatt, R. R. being its successor) as the beneficiary.—Acts of Alabama, 1857-8, page 430, mentioned in Chancellor Cobb's opinion, page 234. Also in 82 Ala. Reports, 530.

The State of Missouri loaned the Cairo & Fulton Railroad Co. $400,000 under the act approved March 3, 1857, entitled an act *to amend an act* to secure the completion of certain railroads in this State and for other purposes, approved December 10, 1855.

Plaintiffs in error have not been able to secure the bound volume of the Acts of State of Missouri of this session, 1857, but have procured a ~~certified~~ copy of the above-named act from the Secretary of Missouri.

In Wilson vs. Boyce, 92 U. S., 320, it was held that the above-named act created a lien in favor of the State of Missouri, on the lands granted by Congress, by the words "*upon the road and property of the several companies*," etc., found in the 17th section of said act.

The act to secure the completion of certain railroads in this State (Missouri) and for other purposes (passed Dec. 10, 1855, Local Acts Missouri, 1855), permitted the sale of the lands.—*Section 25, page 480.*

The State of Alabama loaned to the Alabama and Chattanooga R. R. two million dollars of its straight bonds, and took a statutory lien and mortgage on the lands granted by Congress, and permitted the sale of the lands. Acts of Alabama, 1869–70, page 89.

Thus far the two cases appear almost identical.

McGee claimed under a deed made by trustees January 3, 1859, and in the deed these trustees claim to act through two certain trusts, created and made between them and the Cairo and Fulton R. R. Co., one of date May 23, 1857, the other, 6th October, 1858. (McGee record, page 37).

These two trust deeds are not set out in the McGee record. Plaintiffs in error have procured certified copies of them, and have set them out in an appendix to this brief.

They do not contend that they were a part of the McGee record, or that the Supreme Court of the United States had any knowledge, other than is shown by the McGee deed on page 37, of their existence. They refer to them simply for the purpose of throwing all the light possible on the question now before the Court and to arrive at the true interpretation of these railroad grants, as construed by the Supreme

Court of the United States. They contend, beleiving that they have the right to do so, that the foregoing acts of the State of Missouri were before the Court in making up its decision in the McGee case. In Wilson vs. Boyce, 92 U. S., 320, the Court held that the act approved December 11, 1855, Local Acts of Missouri, page 468, by which the State guaranteed $250,000, did not include the lands granted to the Cairo & Fulton Railroad by Congress, but it held that the act approved March 3, 1857, did include the lands granted by Congress to the Cairo & Fulton Railroad Co., as stated above. This railroad defaulted, and the State of Missouri took steps to protect itself, under the act approved February 19, 1866, Laws of Missouri, 1865, 6 pages, 107 to 114.

The first section required the Governor "to advertise * * * the Cairo & Fulton Railroad of Missouri, * * * as far as the same is constructed, * * * * * * together with appurtenances, rolling stock *and property* of every description, * * * * and to sell the same at auction to the highest bidder, in pursuance of the provisions of *the several acts, creating a lien on said railroads, their appurtenances, rights, and franchises in favor of the State.*"

The Cairo and Fulton Railroad, its rights, franchises, and property were sold under this act, and Joseph C. Reed, A. J. McKay, John C. Vogel, and Samuel Simmons became the purchasers (McGee record, page 11), and through this deed the St. Louis, Iron Mountain and Southern Railroad Co. claimed the land.

Plaintiffs in error contend that the McGee record brought before the Court the several acts of the State

of Missouri, creating a lien in favor of the State on the Cairo and Fulton Railroad, its rights, franchises, *and property*, viz: The act of December 11, 1855, guaranteeing $250,000 of bonds, and the act of March 3, 1857, guaranteeing $400,000 of bonds, the latter including the railroad lands.

As the Court says in the Wilson vs. Boyce, 92 U. S., 324, "the defendant had ready means of learning that the land he purchased was subject to the statutory mortgage. The *deed of trust* under which he claims referred to the statute which created it, and in law he bought with knowledge of it." The statute alluded to was the act of March 3, 1857, *supra*.

The Supreme Court held that the McGee title was good. The completion of the road enured to his benefit, although when he purchased the land had not been earned. (McGee record, pages 41 and 42).

In our case the land had been earned. The road had been completed, and trains running from Chattanooga, Tenn., to Elyton, Ala., a point below where the land is situated, in the direction of Meridian, Miss. (Record, page 9). The amendment averred this fact (record, page 2), besides the record shows it was situated "about two and a half miles southeast of Elyton." (Record, page 53). The entire road was completed on the 17th May, 1871.

It is a case that appeals more stongly in favor of the purchaser, Joab Bagley, as against the State of Alabama, than McGee's purchase as against the State of Missouri.

See Quotation by Chief Justice Waite, 115 U. S., page 473 of section 3, of Act of Congress. The State had authority to hold the lands to reimburse itself. It could only authorize a sale in accordance with the Act of Congress.

The 3rd section of Act of Feb. 19, 1866, required that the amount of the State's lien be realized from the sale, and by section 8 only the lands subscribed by Counties was exempted from the sale.

Nowhere does it appear that the State of Missouri released its lien on the land McGee purchased. The Act of Feb. 20, 1855, section 5, authorized a sale [illegible] of Missouri, 1855,

II.

After the State of Alabama had possesed itself of this Alabama & Chattanooga Railroad, its rights, and franchises, including the lands granted by Congress, it inaugurated a plan of compromise and settlement, which culminated in an act, known as the "debt settlement act," approved February 23, 1876, commencing on page 130, Acts 1875–6.

The Joint Committee of the Senate and House in reporting the bill, which became a law, said in part: * * * "The bill also contains enactments to carry into effect the provisional contracts entered into with the representative of the holders of bonds connected with A. & C. R. R. Co. and secure to all parties their rights in the premises. By its terms the provisions for the sale of the lands and property transferred by the State in discharge of its liability upon the $2,000,000 direct gold bonds, and the application of the proceeds to the persons entitled, and the assurance of title to *bona-fide* purchasers, on sales heretofore made, are to be carried into effect through the agency of trustees, so that judicial control of the subject will always exist for the protection of all parties in interest."—Senate Journal of Alabama, 1875-6, page 320.

Mr. D. C. Anderson, Speaker of the House of Representatives of Alabama, 1875-6, in adjourning *sine die* the session said, among other things: "The leading measures of the session and which will mark its character for a long time to come, are the revenue bill, and that *to settle and compromise the public debt.* * * * If they shall accomplish the object intended, in redeem-

ing the good name and honor of the State, in maintaining in successful operation its great system of *justice and of charity*, without imposing intolerable burdens on the people, it will mark a happy era in the history of our loved commonwealth. I hope, and beleive, that when it is considered that our debt, as now comprised, is within our power to pay, that honor preserved is inestimable. That the larger part of this burden of debt is represented by great highways of inter-communication which are perpetually increasing our population, developing the resources of our territory in minerals and agricultural products, augmenting the old and *creating new sources* of wealth, * * * * these acts of this Assembly will be hailed as the beginning of a great and beneficent change.—House Journal of Alabama, 1875-6, page 688.

The Supreme Court of Alabama say this just and honorable settlement, this system of "justice and of charity," was intended to protect those who purchased strictly in accordance with the act of Congress and who needed no protection. And they base their opinion on their construction of the act of Congress making the grant, and the Court in effect declares that the act of Congress prohibits the State from dealing with this question in a spirit of fairness and justice, for those who purchased strictly in accordance with the act of Congress, needed no protection from any source. The United States could not even interfere with their title.

It is apparent from this record that no attention was paid to the requirements of the railroad grant. The road was constructed with remarkable rapidity, and was completed May 17, 1871. The officers of the

State of Alabama, especially Governor Smith, visited Duffy's office. (Record, page 86).

The United States, in its dealing with the Mobile & Girard Railroad Company, shows its spirit of fair dealing as to lands earned. The 8th section of the act of September 29, 1890 (26 Statutes, 496), reads as follows:

"That the Mobile & Girard Railroad Company of Alabama, shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles. And the Secretary of the Interior in making a settlement and certifying to or for the benefit of the said company the lands earned thereby, shall include therein all the lands sold, conveyed or otherwise disposed of by said company, not to exceed the total amount earned by said company as aforesaid. And the title of the purchasers to all such lands are hereby confirmed, so far as the United States are concerned. But such settlement and certification shall not include any lands upon which there were *bona-fide* pre-emptors or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States.

Suppose the Ala. & Chatt. R. R. had stopped at Elyton, Ala., and an act had been passed by Congress similar to that passed in favor of the Mobile & Girard Railroad Co., could the State of Alabama take under its statutory lien and mortgage these lands earned, and deny to Bagley the right to his land? Justice and equity say not.

Wherein is public policy subserved in denying to

the State of Alabama the right to deal with such purchasers as Bagley, in a spirit of justice and equity, after the road is completed and all the lands earned? The Supreme Court of Alabama says the grant itself stands in the way, "a law as well as a grant."

This construction of the Supreme Court of the State of Alabama doubtless arose from a misconstruction of the law as laid down in the case of Schullman vs. Harriman, 21 Wallace, 63. This fact is very apparent from an inspection of the opinions of this Court in the cases decided by it in regard to this Ala. & Chatt. R. R. grant, especially the case of Swann & Billups vs. Larrmore (appealed to the Supreme Court of the United States), and this case as reported in 82 Ala., 530. The other cases are referred to by Chancellor Cobbs in his opinion, page 234.

The Schullman-Harriman case was that of a railroad, begun and ended on paper, but the cases of McGee and Larrmore, *supra*, deal with completed roads, and properly construed, they authorize and encourage those, whether State, corporate, or individual, who by the completion of railroads, have become entitled to the bounty and liberality of the United States, to deal with purchasers in the spirit of equity and jnstice.

Plaintiffs in error confidently contend that the sale to Bagley was made good as against the railroad company and the State of Alabama, by the completion of the road, the act of February 11th, 1870, having permitted a sale of the lands, independent of the Legislative acts on this subject passed subsequently, and which show beyond question, a desire to treat this subject in a spirit of equity and justice. These Legis-

lative enactments, declaring its purpose to protect "the legal and equitable rights of purchasers," was in keeping with the high aim of the State to inaugurate a "system of justice and charity," as declared by Speaker Anderson.

This praiseworthy purpose has been represssd and nullified, in this case, by the decision of the Supreme Court of Alabama, and its reason for so doing, is that the United States grant prohibits any other course.

And in effect, it decides that the United States places in the hands of the State of Alabama, for its own private gain, lands greater in area than some of our states, because the railroad was completed, but forbids it to do justice to a citizen who, like Bagley, purchased a small tract, paid his money in the usual way, and thus, as far as appears by this record, aided the the completion of the road, by which this immense territory enured to the benefit of the State of Alabama. The Supreme Court of Alabama thus declares the law.

Mr. John C. Stanton testifies that notes to the amount of $75,000 to $100,000, given to the railroad company for the purchase of these railroad lands, were turned over to Fred. Wolfe, the assignee in bankruptcy. (Record, page 98). The debt settlement act required the trustees to collect these notes, so did the Governor's deed to Swann & Billups, pages 75 to 78.

The claim of the Ala. & Chatt. R. R Co. against Bagley's estate was presented to his administrator. (Record, pages 148 to 152). The administrator's report bears date 18th April, 1877. (Record, page 149). The Governor's deed to Swann & Billups bears date February 8, 1877.

The State of Alabama can lift its burdens ($2,000,000 of its straight bonds) from its own shoulders, by the bounty of the general government, but cannot do justice to one who purchased, like Bagley, and aided in the completion of the road.

It may not be out of place, to remark, that in the very beginning of the preamble to this "*great system of justice and of charity*" acts of Alabama, 1875–6, page 130, it appears that the State was a large endorser for the Ala. & Chatt. R. R. Co., and in other sections of this act (Section 14), it appears that it held liens on this railroad, all of which were settled by this "great system," and the larger part of the burden left, was represented by the "great highways of inter-communication."—Speaker Anderson, *supra*.

The construction put upon this grant by the Supreme Court of Alabama, is certainly a very harsh one, and can only be justified by positive enactment or public policy. The cases of McGee and Larrmore, as we beleive, lay down a different rule, one that harmonizes with justice and equity.

In conclusion, plaintiffs in error again refer to the opinion of Chancellor Cobbs, found on pages 233 to 235 of the record, as a proper presentation of the law and the facts of this case, strengthened by the testimony of Mr. Albert F. Thayer, above referred to, and his decree, on page 236, as the proper decree in this case.

For ready reference, the plaintiffs in error have procured, and will furnish for the use of the Court, the following:

Acts of Alabama, 1869-70. 1 volume.

Acts of Alabama, 1875-6. 1 volume.

Acts of Alabama, 1882-3. 1 volume.
Senate and House Journals, 1875-6. 1 volume each.
Laws of Missouri, 1855, Public. 1 volume
Laws of Missouri, 1855, Local. 1 volume.
Laws of Missouri, 1865-6. .1 volume.
~~Certified~~ copy of the Act of Missouri, approved March 3, 1857.

ELLIS PHELAN,

Attorney and Solicitor for Plaintiffs in Error.

Additional brief on page 38.

APPENDIX.

BOOK "E" OF STODDARD COUNTY RECORDS, 1858.

This Indenture, made this twenty-third day of May, in the year of our Lord one thousand eight hundred and fifty-seven, between the Cairo and Fulton Railroad Company of Missouri, of the first part, and John Moore and John Wilson of the State of Illinois, and Albert G. Waterman of the State of Pennsylvania, Trustees, of the second part, Witnesseth :

Whereas, The said parties of the first part, for the purpose of raising funds from time to time, for the consideration, furnishing and completion of their Railroad, as surveyed and established, under and by virtue of the Laws of the State of Missouri, propose to issue and deliver from time to time, as may be necessary, their Bonds or obligations bearing even date herewith, and thereby to become indebted to divers persons, bodies politic, or corporate, who shall become holders of said Bonds or obligations, in the just and full sum in the aggregate of One Million and Six Hundred Thousand Dollars, lawful money of the United States of America, secured to be paid by their Sixteen Hundred Bonds or obligations of One Thousand Dollars each, providing for the payment unto the said persons, bodies politic or corporate, or their

assigns respectively, the said sums of money therein provided to be paid, on the first day of October, which will be in the year One Thousand Eight Hundred and Eighty-two (1882), and also interest for the same at and after the rate of seven per centum per annum, payable on the first days of April and October in each year, upon and after the first day of April in the year one thousand eight hundred and fifty-eight (1858) until the principal sums named in said Bonds or obligations respectively, shall be severally paid and satisfied in the manner and form in the said Bonds or obligations set forth and declared, and as by reference thereto will more fully appear.

Now therefore, this Indenture witnesseth that the said parties of the first part, for the better securing and more sure payment of the said sums of money mentioned in said Bonds or obligations, and each and every of them, according to the best intent and meaning thereof, and also for and in consideration of the sum of One Dollar in hand paid by the said parties of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, remised, released, conveyed and confirmed, and by these presents do grant, bargain and sell, remise, release, convey and confirm unto the said parties of the second part, and the survivor and survivors, and successor and successors of these presents forever, all and singular the lands and real estate described and set forth in the schedule hereto annexed, marked and numbered on pages one to fifty-two inclusive, and made part and parcel of this Indenture, as fully as if the same were here inserted at length ; being public lands free from incumbrance and held by the said parties of the first part by absolute title in fee simple under letters patent from the United States of America and the State of Missouri, and lying along and contiguous to the Railroad of the said parties of the first part, to aid in the construction, completion, furnishing and maintenance of their said Railroad, amounting in quantity to four hundred thousand acres of land. And also all and singular the several pieces or parcels of land, being the railway, stations and depots of the Railroad of the said parties of the first part, from the Mississippi River at the mouth of the Ohio to the Southern boundary of the State of Missouri, being in length about seventy-seven and a half miles, and all and singular the stations and depots, buildings, engine houses and other improvements and constructions thereon, now made or here-

after to be made, together with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issue and profits thereof, and also all the estate, right, title, interest, property claim and demands whatsoever at law or in equity of the said parties of the first part, of in and to the same, and each and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the lands and tenements hereby granted or intended so to be, and each and every part and parcel thereof, with the appurtenances unto the said parties of the second part, and the survivor and survivors, successor and successors of them forever, as joint tenants and not tenants in common, for the uses and purposes of this Indenture set forth and herein described; subject, however, with respect to said Railroad and every part and section thereof and its appurtenances, to a prior first and only present lien, in the nature of a mortgage in favor of the State against the payment of such Bonds or obligations as said State may from time to time issue and deliver to the said parties of the first part, to aid in the construction of said road under and by virtue of the provisions of two general acts of the General Assembly of said State of Missouri entitled and approved as follows: An act to expedite the construction of the Cairo and Fulton Railroad of Missouri, dated December 11th, A. D. 1855; and also an act to amend an act to secure the completion of certain railroads in the State and for other purposes, approved December 10th, 1855; approved March 3d, A. D. 1857, the amount of said Bonds or obligations so to be executed and delivered by said State, and to secure the payment of which by the said parties of the first part, the said lien or mortgage is created in favor of said State, not to exceed the sum of six hundred and fifty thousand dollars, with the interest thereon, at the rate of six per cent. per annum, as by reference to said several acts recited, will more fully appear, it being specially declared and provided that nothing herein contained shall have effect or operate as a lien upon said Railroad, nor any part or section thereof, nor its appurtenances, prior to or in derogation of, or in any way interfere with the lien of the said State under the laws above cited; but that the same shall remain subject in all respects to the full operation of said acts, according to their true intent and meaning, as if this Indenture had not been executed; said Rail-

road and its appurtenances to be subject also to the possession, control and management of the said parties of the first part so long as the conditions of said Bonds or obligations to be issued by the said parties of the first part shall remain unforfeited by the proper performance of all the stipulations thereof :

Provided always and these presents are upon the express condition, that if the said parties of the first part shall well and truly pay or cause to be paid to the holders of the said Bonds or obligations and every of them, the principal sums of money therein mentioned, with the interest thereon, at the time and in the manner therein provided, according to the true intent and meaning thereof and of these presents, that then and from thenceforth this Indenture and the estate hereby granted shall cease, determine and be utterly void.

And this Indenture further witnesseth, That these presents and the said Bonds or obligations are made, executed and delivered upon the terms, conditions and agreements following : that is to say,

First, That the actual possession, use, management and control of the said Railroad, with all the appurtenances thereto belonging, shall be and remain with the said parties of the first part, without any molestation or interference of the said parties of the second part, as long as the condition of said Bonds or obligations shall remain without default or perfection, and the said parties of the first part shall perform and keep the stipulations thereof.

Second, That from and after the due execution and delivery of this instrument, the said lands shall be deemed and taken to be in the legal possession and control of the said parties of the second part, as in case of absolute title in fee simple, with full covenants of seizure and warranty, subject only to such occupancy and right of way, and the right to take timber and other materials from any part or parcel thereof as may be necessary in the construction, maintenance and operation of the Railroad of the said parties of the first part, and the branches and connections thereto. The said parties of the first part shall with as little delay as practicable, furnish to the said parties of the second part such maps, plats, schedules and lists of the lands hereby granted as they may require, with descriptions of the locations and character thereof, and a list of valuations for their information in selling, it being provided that

such valuations shall not be less in the aggregate than two millions of dollars, being an average price of five dollars per acre.

Third, That the said parties of the second part having first been provided with proper maps, schedules, &c., as aforesaid, and fixed therein lists of valuation or selling prices, shall and will grant, bargain, sell and convey to all persons, bodies politic or corporate, applying for the purchase of any of the lands and premises above mentioned, making or tendering payment therefor. Such sales may be for cash or bonds of the said parties of the first part, part and parcel of the same bonds hereinbefore referred to, or partly for each, upon such credits and at such rates of interest as the said parties of the second part may determine. They may in selling upon credit adopt and use such form of contract, and take such security for the payment of purchase money and its interest as they may determine, and may from time to time change and adjust the selling prices according to the true value of each tract of land to be sold.

But if by reason of inferior quality any lands shall be sold for a less price than ten dollars per acre, a sufficient quantity of other lands shall have been or shall be sold at prices above that sum, so as to maintain and keep good at each accounting or return made of lands sold, the actual average of prices for land sold at the time, at not less than five dollars per acre.

Fourth, The purposes of this trust being to secure to the holder the payment of the sixteen hundred bonds aforesaid, with the interest thereon, it is hereby provided and declared that each and every tract of land comprised in the schedule hereto annexed and herein conveyed, now is and shall remain subject to the liabilities and uses of this trust until released and discharged as hereinafter provided; that is to say, on the execution of any deed to which any purchaser may become entitled, the said parties of the second part may require from such purchaser bonds of the said parties of the first part, to the full amount of the purchase price of the land sold; or if all or any portion of said amount shall have been or shall then be paid in money, it shall be the duty of the said parties of the second part to purchase therewith sufficient bonds to bring to their hands, on account of each tract sold, bonds in amount equal to the purchase money thereof, so that in no case shall any tract of land be conveyed by deed of the said parties of the second part, without the surrender and consequent discharge of such bonds to the full amount of the purchase money aforesaid. On tender of any bond

exceeding in amount or less than the purchase price, the said parties of the second part may pay to or receive from the purchaser such difference as there may be, in money or otherwise, as they may determine. For convenience in selling, the said parties of the second part may issue their scrip for parts or fractional amounts of bonds, on canceling a like amount in bonds, which scrip may in such manner as they shall therein provide, be receivable for lands in lieu of bonds.

Fifth, The said parties of the second part shall and will cancel and discharge each and every bond or obligation, and the interest warrants thereon, which they may receive in payment for lands, by defacing the seal of the corporation and writing thereon such memorandum as will effectually destroy the validity of the same; it being the intent hereof to anticipate the payment of said bonds by the sale and conveyance of said lands, in such manner that the sale of lands and the cancellation of bonds shall proceed *pari passu* to the end, without diminution of the actual security upon which all or each of said bonds, at any time outstanding, may rest. On payment being made by the purchaser of any such tract or tracts of lands, in money or bonds as herein required, and the due execution and delivery of proper deeds of conveyance, the tract or tracts so conveyed shall thereby be released and discharged from the operation of this Indenture and held no longer liable for the fulfillment of the conditions hereof; it being intended that such conveyance shall operate as an acquittance of the particular tract or tracts so conveyed, and vest in the purchaser an absolute and indefeasible title in *fee simple*.

Sixth, That the said parties of the first part shall and will, when required so to do, deliver to the said parties of the second part full and sufficient security, to be approved by them, for the punctual and full payment by the said parties of the first part, of all the interest warrants of said sixteen hundred bonds or obligations, as the same shall from time to time become due and payable. Such security may consist of money in hand or interest-paying State bonds or stocks, or of lands to be conveyed in trust to the said parties of the second part; such securities, of whatsoever kind the same may be, shall be given to the said parties of the second part, under such assignments, conveyances and acquittances, by and in behalf of the said parties of the first part, as will confer upon the said parties of the second part absolute and summary power of sale, according to

their description, without process of law, whenever the said parties of the first part shall fail to pay the interest warrants aforesaid, or any part thereof, according to the terms thereof. All interest warrants paid by the said parties of the second part shall be charged over to the account of the said parties of the first part.

Seventh, That all moneys coming to the hands of the said parties of the second part under the provisions hereof shall, after the payment of the expenses attending the due execution of the trusts hereby created, be held by them in trust, and appropriated, first, to the payment of any lawful taxes and assessments which may be levied upon said lands, and the care and preservation of the same; second, to the payment of any arrears upon interest warrants, should the said parties of the first part at any time fail to pay the same; third, to the redemption of the principal of said bonds, until the whole shall be paid and redeemed by the sale of said lands, or the application of the avails thereof. On the full payment and redemption of said sixteen hundred bonds and the interest warrants thereof, the said parties of the second part shall render unto the said parties of the first part a full, perfect and final account of their doings, and pay over and deliver to the said parties of the first part, their successors and assigns, all moneys, notes, contracts, plats, books and property of every kind, belonging or appertaining to the subject matter of this Indenture, and also reconvey to the said parties of the first part all lands then remaining unsold; and thereupon this trust shall cease and determine.

Eighth, That for the purpose of containing and securing the due execution of the trusts hereby created, it is declared that all vacancies that may occur in the office of Trustee, by death, resignation or otherwise, shall be filled thus: The first vacancy shall be filled by a majority of the members of the Board of Trustees as constituted, being in office at the time such vacancy shall take place. The next vacancy shall be filled by the said parties of the first part, and so on alternately until the end. And Trustees so appointed shall fill the term, and succeed to and perform all the duties, and have all the powers hereby conferred upon members of the Board of Trustees herein named or provided for. They shall constitute and appoint of their own number or otherwise, a President of their Board of Trustees, who shall be a member thereof, and who shall hold his office for such time, and have and exercise such powers and duties as they may confer and appoint, as fully

and with like effect as if herein expressed. Such other officers and agents as shall be necessary to the execution of this trust may be appointed in such manner as they may determine, rates of compensation fixed, and such rules and regulations made and carried into effect as they may deem necessary.

And this Indenture further witnesseth: That the said parties of the first part, for themselves and their successors, do covenant and agree to pay unto the holders of the said bonds or obligations respectively, the said principal sums of money therein respectively mentioned as above, and as expressed in said bonds or obligations, according to the true intent and meaning thereof; and that if default shall be made in the payment of the interest upon said bonds or obligations, so that a sum equal to one year's interest on the whole amount of the said bonds or obligations actually issued and secured by these presents; or if default shall be made in the payment of the principal of said bonds or obligations, that then and from thenceforth it shall and may be lawful for the said parties of the second part to sell and dispose of all and singular the said lands hereby conveyed then remaining unsold, and all benefit and equity of redemption of the said parties of the first part herein, at public auction, giving reasonable and public notice of the time and place of said sale, by publication in the newspaper of the State Printer at Jefferson City, and in a newspaper in each County in which said lands lie, if any there be; and for and in behalf of the said parties of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance, in the law, for the same, in fee simple; and out of the moneys arising from such sale or sales, to retain the interest and principal which shall then be due on such bonds or obligations for the benefit of the holders thereof; together with the costs and charges of advertisements and sale of said premises, rendering the surplus (if any there be) to the said parties of the first part, their successors and assigns, which sale shall be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and all other persons claiming, or to claim the premises, or any part thereof, by, from or under them, or either of them. And on the happening of any default, as hereinbefore mentioned, in any such payment of interest or principal of said bonds, the said parties of the second part may in their discretion enter into and upon, and

take possession of all and singular the Railroad and its appurtenances intended to be included herein, and may by their officers and agents occupy, control and operate the same, and take and receive the income and profits thereof, applying the same, first: to the payment of the current expenses of said road and its needful repairs, and next to the prompt payment of the interest on all State Bonds which shall have been issued to the said parties of the first part, by the State of Missouri, by virtue of the several acts of the Legislature thereof hereinbefore referred to, and then to the payment of the interest and principal of the bonds of the said parties of the first part, in such manner as they may deem proper. The posssesion and control of said Railroad by the said parties of the second part after such default, shall be in the place and stead of like possession and control of the said parties of the first part, under the laws of the State of Missouri, and no more, nor shall any such possession or control be deemed or held to contravene any right of the State of Missouri, by virtue of the several acts hereinbefore referred to. No lien or right of sale is hereby created, or intended to be created, in behalf of the said parties of the second part, nor of the holders of said bonds, nor any creditors of the said parties of the first part, with respect to said Railroad, or any matter or thing pertaining or belonging thereto, which shall interfere with, take precedence of, or disturb in any way the right of the State of Missouri, as created and defined in the several acts of the General Assembly, thereof hereinbefore referred to, the provisions of which acts heve been duly accepted by the said parties of the first part, as binding irrevocably upon the said parties of the first part, and as fixing upon said Railroad a first prior and undisturbed lien in favor of said State of Missouri. The intent hereof being to transfer to the said parties of the second part, on the happening of of such default, only such right, title, interest and control as now pertains and is incident to the said parties of the first part by virtue of the laws of the State of Missouri, their power of sale with respect to said Railroad to remain in abeyance until the lien of said State shall have been discharged, or the rights of the parties herein modified by law of said State, then the power of sale hereinbefore vested in the said parties of the second part, with respect to the lands hereby conveyed and the application of the avails thereof, in manner and form shall apply and attach to said Railroad and its appurtenances, so far as shall be necessary to redeem any bonds of

the said parties of the first part yet outstanding, after the avails of said lands shall have been exhausted. And it is hereby mutually agreed by and between the parties to these presents, that the said parties of the second part, their heirs, executors or administrators shall not be answerable for the acts, omissions, or default of each other, and that each shall be accountable only for the exercise of reasonable diligence in the management of said trust. And it is further agreed, That the said parties of the first part, their successors and all and any persons whomsoever, lawfully or equitably deriving any estate, right, title or interest of, in or to the premises hereinbefore granted by, from, under or interest for them, shall or will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law, of the said parties of the second part, their successors and assigns, make, do and execute, and cause to be made, done and executed, all and every such further and other reasonable acts, conveyances and assurances in the law, for the better and more effectual vesting and confirming the premises hereby granted, or intended so to be, in and to the said parties of the second part, their successors and assigns forever, and to secure the due execution of the powers herein granted, as by the said parties of the second part, their successors and assigns, or by counsel learned in the law, shall be reasonably devised, advised or required.

In witness whereof, the said parties of the first part, The Cairo & Fulton Railroad Company of Missouri, have caused their corporate seal to be hereunto affixed, and these presents to be signed by Mason Brayman, their President, and the said parties of the second part, the said John Moore, John Wilson and Albert G. Waterman, Trustees, in testimony of their acceptance of said trust, have hereunto set their hands and seals the day and year first above written.

[SEAL.]

M. BRAYMAN, President Cairo & Fulton Railroad Co. of Mo.

Attest, G. R. TEASDALE, Secretary
C. & F. R.R. Co. of Mo.

JOHN MOORE. [SEAL].
JOHN WILSON. [SEAL].
A. G. WATERMAN. [SEAL].

Witness as to A. G. Waterman,
ANO. J. BREBAN.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.

I, George W. Lowry, Clerk of the Circuit Court of the United States for the Southern District of Illinois, do hereby certify, that on this thirtieth day of April, A. D. 1858, before me at my office in the City of Springfield, in said State, came Mason Brayman, the President of the Cairo & Fulton Railroad Company of Missouri, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as a party thereto; and who being by me duly sworn, deposes and says, that he resides in the City of Springfield, in said State; that he is the President of the said Cairo & Fulton Railroad Company of Missouri; that the seal affixed to the said Instrument is the corporate seal of the said Company, and was affixed to the said Instrument by authority of the Board of Directors of said Company, for the uses and purposes therein expressed; and that he, by like authority, did subscribe his name, as President of said Cairo & Fulton Railroad Company of Missouri.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of my said office,
[SEAL]. at the City of Springfield, the thirtieth day of April, A. D. 1858.

GEO. W. LOWRY, Clerk.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.

I, George W. Lowry, Clerk of the Circuit Court of the United States for the Southern District of Illinois, do hereby certify, that on this seventh day of May, A. D. 1858, before me at my office in the City of Springfield, in said State, came John Moore and John Wilson, Trustees of the Cairo & Fulton Railroad Company of Missouri, who are to me personally known to be the same persons whose names are subscribed to the foregoing Deed of Trust, as parties thereto, and acknowledged that they had signed and executed the same as such Trustees, as their act and deed, for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed the seal of my said office,
[SEAL]. at the City of Springfield, the seventh day of May, A. D. 1858.

GEO. W. LOWRY, Clerk.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } ss.

I, Benjamin Palton, Clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that on this fourteenth day of May, A. D. 1858, before me at my office in the City of Philadelphia, in said State, came Albert G. Waterman, Trustee of the Cairo & Fulton Railroad Company of Missouri, who is to me personally known to be the same person whose name is subscribed to the foregoing Deed of Trust, as a party thereto, and acknowledged that he had signed and executed the same, as such trustee, as his act and deed, for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed the seal of my said office, at the City of Philadelphia, the fourteenth day of May, A. D. 1858.

[SEAL].

BENJ. PALTON.

North

THE NORTH HALF OF THE EAST QUARTER OF SECTION 17, TOWNSHIP 26, RANGE 11, EAST, WITH OTHER LANDS.

The foregoing Schedule of Lands comprised on fifty-two pages contains, according to estimate, four hundred and five thousand (405,000) acres of land. The Deed of Trust, which is made to secure the payment of the bonds therein referred to, requiring a schedule of four hundred thousand (400,000) acres only, the surplus of five thousand (5,000) acres is added to cover any deficiencies which may occur from errors of description, conflicting claims, or other cause which may make necessary the withdrawal of any tract or tracts from the list; the uses of this excess being to enable the trustees to release, by quit-claim (without cancellation of bonds), as in case of full conveyance under the provisions of the Deed of Trust, any tract or tracts on which error or conflicting claim rests, without in any event reducing the quantity standing as security for the redemption of bonds, below four hundred thousand acres.

For verification of the foregoing schedule of lands, and of this declaration explanatory thereof, the signatures of the President and Secretary, and the seal of said Cairo & Fulton Railroad Company of Missouri, are hereto affixed, as of the day and year first above written.

[SEAL].

M. BRAYMAN, President.

Attest, G. R. TEASDALE, Secretary.

Received for record and recorded the 28th day of July, A. D. 1858.

REUBEN P. OWEN,
Clerk and Recorder, *ex-officio*.

STATE OF MISSOURI, } ss.
COUNTY OF STODDARD, }

I, C. H. Barham, Clerk of the Circuit Court and Recorder, *ex-officio*, within and for the County and State aforesaid, do hereby certify, that the above and foregoing is a true copy of the Deed of Trust from the Cairo & Fulton Railroad Company of Missouri to John Moore, John Wilson and Albert G. Waterman, Trustees, as fully as the same appears of record in my office (with exception of a part of the land described in Deed of Trust), in Book "E," at page 1 and following.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Bloomfield, Mo., this the 30th day of September, 1890.

[SEAL].

C. H. BARHAM,
Circuit Clerk and Recorder.

REGISTER F, OF DEEDS, STODDARD COUNTY, MISSOURI, A. D. 1859.

Whereas, The Cairo & Fulton Railroad Company of Missouri, a corporation having existence by virtue of the Laws of the State of Missouri, did execute a certain Deed of Trust bearing date the twenty-third day of May, in the year one thousand eight hundred and fifty-seven, whereby lands of said Company, being four hundred thousand acres, more or less, lying within said State, as comprised in a schedule accompanying and being part of said deed, were conveyed to John Moore, John Wilson and Albert G. Waterman, Trustees, in trust for certain uses and purposes therein mentioned, and especially to secure the payment of the sixteen hundred bonds of said Company, being for one thousand dollars each, on the first day of October, A. D. eighteen hundred and eighty-two, with interest at seven per centum per annum, payable in the City of New York

semi-annually on the first days of April and October in each year, as by reference to said Deed of Trust, executed in triplicate and duly recorded, will appear.

And whereas, the Board of Directors of said Company did, at their special meeting, held at the office of said Company, on the twenty-eighth day of August, eighteen hundred and fifty-eight, for the better securing the payment of the interest to become due on said bonds, order or direct all the lands of said Company, acquired or to be acquired, and not included in said first Deed of Trust, to be conveyed by a supplemental Deed of Trust to the said John Moore, John Wilson and Albert G. Waterman in trust.

Now, therefore, this Indenture of Trust, made this sixth day of October in the year eighteen hundred and fifty-eight, between the Cairo & Fulton Railroad Company of Missouri, of the first part, and John Moore and John Wilson of the State of Illinois, and Albert G. Waterman of the State of Pennsylvania, of the second part, Witnesseth, That the said Cairo & Fulton Railroad Company of Missouri, party of the first part, for and in consideration of the matters herein set forth, and of the sum of one dollar in hand paid, have granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents do hereby grant, bargain and sell aliens, releases, conveys and confirm unto the said John Moore, John Wilson and Albert G. Waterman, party of the second part, and the survivor or survivors, successor and successors of them forever, all the lands heretofore acquired, or hereafter to be acquired by the said party of the first part, by virtue of or under any grant of the Government of the United States, or of the State of Missouri, or of any County, Town or Corporation in said State, which are or hereafter shall be of said party of the first part, and not included in the Deed of Trust to which this is supplementary ; it being intended, and the effect of this Indenture is declared to be to vest in said trustees a title to the lands hereby conveyed, as full and absolute as the title by which the lands conveyed in said Deed of Trust are now held by them, reference thereto being had and all the parts thereof necessary to that end being herein and hereby adopted, as full as if inserted in this instrument at length, said parties holding in trust in manner and for the uses hereinafter set forth. For the correct and apt designation and setting apart of the lands in such are the object of this trust, it is provided that this Indenture shall be duly recorded in each county in which any lands

herein conveyed may be situate; and so fast and whenever any lands shall vest in said party of the first part, by any form of titles, or in which said party of the first part shall have any interest, equitable or by contract, inchoate or complete, the title claim and interest to and in all such lands, shall immediately and by force of such title, claim and interest of the said party of the first part, vest in, pass over to, and be in the said party of the second part. And for further and more convenient designation of said lands, the said party of the first part shall from time to time as fast as such titles or rights acrue, certify under the corporate seal of said Company and deliver to said party of the second part, schedules of such lands, which when recorded, shall be deemed and taken as part and parcel of this Indenture, as if inserted at length herein, or attached hereto and herein referred to. Until such schedules be recorded, the title deed or evidence of claim or interest of said party of the first part, or certified copies thereof, shall be sufficient designation to bring such lands within the operation of this Trust.

This Trust is declared to be in the party of the second part and their successors, by virtue of their being Trutees under the Deed of Trust to which this is supplementary, with all the powers therein conferred, and as they are now organized as a Board of Trustees, without any further act of organization the provisions of this Indenture to be executed by them as if the same were a part of said original Trust Deed. The lands hereby conveyed shall be denominated Interest Lands, and shall be held in trust by the said Board of Trustees who shall have power to take possession of such lands, and possess and control the same fully, as held by absolute title in fee simple, reserving right of way, depot grounds, and the right to take therefrom timber, materials and fuel necessary to the location, construction and operation of the railroad of the party of the first part. To sell and dispose of said land by such form of deed or contract, in such quantities, at such prices, on such time and terms of payment, at such rates of interest for cash in hand, for interest warrants of bonds of said Railroad Company, as they may from time to time determine. To issue Scrip in payment of interest warrants or coupons, and to provide for the redemption thereof in cash or sales of land. To make summary sales without process of law, or to mortgage any lands hereby conveyed for the payment of such interest warrants or coupons, if in their discretion necessary to secure the punctual payment of the same and protect

the credit of said Company. All moneys arising from the sale of Interest Lands shall be a reserve fund, held by said Board of Trustees to be applied, first, to the necessary expenses attending the execution of this Trust; second, to the payment of interest warrants or coupons of the sixteen hundred bonds of said Company heretofore authorized; third, to the redemption of the principal of any of such bonds whenever a surplus shall remain safely applicable to that object, the declared object of this Trust being to secure at all times the full and punctual payment, when due, of the said interest, and to confer upon said Board of Trustees all power necessary to that end.

This Indenture is declared to be executed in compliance with the sixth clause of the original Deed of Trust, to which this is supplementary, subject specially to the provisions of the eighth clause thereof, and to all such provisions thereof as are applicable to the execution of the Trusts hereby created to vest and be in said Trustees, and their successors, and in their Board of Trustees, so long as interest warrants or coupons of said bonds remain to be redeemed on the completion of this Trust. All moneys, securities, property and lands remaining in the hands of said party of the second part shall be redelivered and reconveyed to to the said party of the first part, their successors or assigns.

In witness whereof, the said parties of the first part, The Cairo & Fulton Railroad Company of Missouri, have caused their corporate seal to be hereunto affixed, and these presents to be signed by Mason Brayman, their President, and the said parties of the second part, the said John Moore, John Wilson and Albert G. Waterman, Trustees, in testimony of their acceptance of said trust, have herewith set their hands and seals the day and year first above written.

[SEAL].

M. BRAYMAM, President Cairo & Fulton Railroad Co. of Mo.

Attest, G. R. TEASDALE, Secretary
C. & F. R. R. Co. of Mo.

JOHN MOORE. [SEAL].
JOHN WILSON. [SEAL].
ALBERT G. WATERMAN. [SEAL].

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.

I, George W. Lowry, Clerk of the Circuit Court of the United States for the Southern District of Illinois, do hereby certify, that on this sixth day of November, A. D. 1858, before me at my office in the City of Springfield, in said State, came Mason Brayman, the President of the Cairo & Fulton Railroad Company of Missouri, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as a party thereto; and who being by me duly sworn, deposes and says, that he resides in the City of Springfield, in said State; that he is the President of the said Cairo & Fulton Railroad Company of Missouri; that the seal affixed to the said Instrument is the corporate seal of the said Company, and was affixed to the said Instrument by authority of the Board of Directors of said Company, for the uses and purposes therein expressed; and that he, by like authority, did subscribe his name, as President of said Cairo & Fulton Railroad Company of Missouri.

In witness whereof, I have hereunto subscribed my name and affixed the seal of my said office, at the City of Springfield, the sixth day of November, A. D. 1858.

[SEAL].

GEO. W. LOWRY.

Clerk of the Curcuit Court of the United States for the Southern District of Illinois.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF ILLINOIS, } ss.

I, George W. Lowry, Clerk of the Curcuit Court of the United States for the Southern District of Illinois, do hereby certify, that on the sixth day of November, A. D. 1858, before me at my office in the City of Springfield, in said State, came John Moore, Trustee of the Cairo & Fulton Railroad Company of Missouri, who is to me personally known to be the same person whose name is subscribed to the foregoing Deed of Trust, as a party thereto, and acknowleged that he had signed and executed the same as such Trustee, as his act and deed, for the uses and purposes therein expressed.

In witnesss whereof, I have hereunto subscribed my name and affixed the seal of my said office, [SEAL]. at the City of Springfield, the sixth day of November, A. D. 1858.

GEO. W. LOWRY,
Clerk of the Curcuit Court of the United States for the Southern District of Illinois.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.

Be it remembered, that on the eighteenth day of November, A. D. 1858, before me, the subscriber, a commissioner resident in the City of Philadelphia, aforesaid, duly commissioned and qualified by the executive authority, and under the Laws of the State of of Missouri to take the acknowledgement of Deeds, etc., to be used or recorded therein, personally appeared John Wilson and Albert G. Waterman, Trustees of the Cairo & Fulton Railroad Company of Missouri, to me known to be the persons whose names are subscribed to and who executed the foregoing Deed of Trust, as parties thereto, and severally acknowleged that they, and each of them, had signed and executed the same as such Trustees, as their, and each of their, act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed [SEAL]. my name and affixed my official seal, at Philadelphia, the day and year aforesaid.

CHARLES SERGEANT,
Commissioner of Missouri, 432 Walnut Street, Philadelphia.
Received for record and recorded February 1, 1859.

REUBIN P. OWEN,
Clerk and Recorder, *ex-officio*.

STATE OF MISSOURI,
COUNTY OF STODDARD, } ss.

I, C. H. Barham, Clerk of the Circuit Court and *ex-officio* Recorder, within and for the County and State aforesaid, do hereby certify, that the above and foregoing is a true copy of the Trust Deed from Cairo & Fulton Railroad Company to Trustees, as fully as the same appears of record in my office, in Book "F," for recording Deeds, etc., at page 252.

[SEAL]. In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Bloomfield, Missouri, this September 19th, 1890.

C. H. BARHAM,
Circuit Clerk and Recorder.

TERM No. 623.

ADDITIONAL BRIEF, IN REPLY TO MR. SMITH.

The opinion of Chancellor Cobbs, as to Duffy's authority, is fully sustained by all the authorities, and it is tacitly acquiesced in by the decision of the Supreme Court of Alabama. If the question should become a controlling one in the decision of this case, which Plaintiffs do not anticipate, they desire to call the attention of the Court to the depositions of Daniel J. Duffy and John C. Stanton, on their re-examination. Record pages 16, 20, 21.

Duffy's proposition was *in writing*, and Mr. Stanton says he submitted it, at a regular meeting of the Board of Directors, and that it was accepted. Mr. Stanton is corroborated by Mr. Thayer, for the authority given to him on the 26th January, 1869, was not that given to him after the Franco-Prussian war had put the finances of the Company in a bad way, as testified to by Mr. Thayer. Money was badly needed, and what could have afforded a better opportunity than the sale of the lands?

The agreement on page 7 of the record only goes to the extent that Jeremiah Richards testified to a certain state of facts. Mr. John C. Stanton and Mr. Thayer are as much entitled to credit as this Jeremiah Richards. If the State of Alabama and these Trustees had have shown the same zeal in carrying out this "system of justice and charity" that they have in defeating it, so far as the Stanton sales are concerned, no doubt they could have forced D. N. Stanton to deliver up this Minute Book, especially through the Bankrupt Court.

The delay complained of was caused by the action of these trustees in persistently denying the validity of the Stanton sales.

The defendant Phelan (to the original bill) is not a party to this appeal. If the appellants are successful they are under no obligation, legal or equitable, to make his title good. He holds a pure quit claim (Record page 119).

The injunction was not insisted on.

The contradictory testimony of the witnesses Anderson, White and Randolph, alluded to by the defendant's counsel, was clearly illegal, and was excluded by the Chancellor on motion. Record pages 155, 156, 236.

Plaintiffs note the death of their attorney, Hon. Thos. H. Watts, which occurred since this case was docketed in this Court.

ELLIS PHELAN,
Attorney for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
MAR 7 1893
JAMES H. McKENNEY,
CLERK.

CASE NO. 14,435. TERM NO. 623.

REUBEN B. MILLER, Executor of D. B. Miller, deceased, and REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER and IRVING MILLER, heirs of D. B. MILLER, deceased, et al., Plaintiffs in Error,

vs.

JOHN S. VANN and JOHN A. BILLUPS, Trustees; W. J. VanKIRK, JOHN N. JENKINS, E. A. TAYLOR, and JULIA B. BERRY.

Cause depending in the Supreme Court of the United States.

Brief of John A. W. Smith, on Motion Made by John A. Billups, one of the Defendants, to Dismiss Said Cause.

CASE NO. 14,435. TERM NO. 623.

REUBEN B. MILLER, Executor of D. B. Miller, deceased, and REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER and IRVING MILLER, heirs of D. B. MILLER, deceased, et al., Plaintiffs in Error,

vs.

JOHN SWANN and JOHN A. BILLUPS, Trustees; W. J. VANKIRK, JOHN N. JENKINS, E. A. TAYLOR, and JULIA B. BERRY.

Cause depending in the Supreme Court of the United States.

Brief of John A. W. Smith, on Motion Made by John A. Billups, one of the Defendants, to Dismiss Said Cause.

THE RECORD.

The record discloses that there were two appeals to the Supreme Court of Alabama from final decrees of the Chancery Court of Alabama. Defendants in error prosecuted the first appeal, and reversed the decision of the lower court. The next appeal was by plaintiffs in error, and in that one the decree of the lower court was affirmed. From the latter decree the case comes to this Court by writ of error.

There was an agreement of counsel that the record on first appeal should be treated as so much of the record of the

second appeal as was shown thereby, and only amendments to pleadings and additional evidence constitute the record on second appeal, excepting by agreement the former record was referred to and made a part of the second. The agreement of counsel is on pages 38 and 39 of record.

By reason of thus blending the two records into one on last appeal, the record, as it stands in this court, is a little confused. The commencement of proceedings in Alabama Chancery Court was the filing of the bill, as shown on page 41-50 of record. From pages 41 to 238 shows the first proceedings in the State Courts in the order in which they occurred. The judgment of the Supreme Court on first appeal is not shown by the record, but the opinion of the Court is shown on page 530, 82 Ala. After the proceedings shown on pages from 41 to 238 inclusive, and after judgment of Supreme Court of Alabama reversing the decree of the Chancellor and remanding the cause for further proceedings in the lower court, the proceedings shown on pages 1 to 40 inclusive were had in said lower court. From the Chancellor's decree, as shown on page 38 of record, D. B. Miller appealed to Supreme Court of Alabama, as shown on pages 39 and 40 of record. Upon this latter appeal, proceedings were had in the Alabama Supreme Court as shown on pages 239 and 240, which finally determined the case in the State Courts.

THE FACTS.

In the record sent up in response to the writ of error, D. B. Miller was appellant in the Supreme Court of Alabama, and John Swann, John A. Billups, Trustees, and W. J. VanKirk, John M. Jenkins, Julia B. Berry, E. A. Taylor, W. S. Winstead, and Ellis Phelan were appellees. (See record, page 49, where each are made defendants.) Before the case was submitted in the Supreme Court of Alabama, D. B. Miller died, and his death was suggested and "shown to the Court," and a motion was made to revive, but in whose name or names is not shown by the record. (See record, page 239). The case was submitted on this motion, and on errors assigned, and on May 2d, 1890, a judgment was rendered by

the Supreme Court of Alabama, affirming the decree of the Chancery Court without any order having been made reviving the suit (Record, page 240.) On Sept 20, 1890, appellee, John Swann, died (See affidavits annexed to motion), and on the 9th of October, 1890, a writ of error was sued out in the name of D. B. Miller's executor and heirs against John Swann, who was not living at the time, and against only a part of the remaining appellees in the case shown by the record which is sent up in reponse to said writ of error, Ellis Phelan and W. S. Winstead being appellees in the cause shown by said record, but who are not mentioned in the writ of error. Citation was served on John A. Billups only.

BRIEF.

In the case shown by the record, Ellis Phelan and W. S. Winstead were made parties defendant (see original bill on page 49 of record). Winstead answered (see record, page 78) and is a party appellee to the case shown by the record, but is not a party to the writ of error Several plaintiffs were named in the writ of error followed by the words et al., which has been held an insufficient description of parties.

The Heirs of Nicholas Wilson vs. Ins. Co., 12 Pet. 140;
Freeborn vs. The Ship Protector, etc., 11 Wall, 82;
Mason vs. United States, 136 U. S. 581.

I suppose that the fact of D. B. Miller's death prior to the submission of the cause and the rendition of the final judgment in the Supreme Court of Alabama, will not be denied. The fact exists, and is shown by the record. The following orders were made in the Supreme Court of Alabama (see record, page 239):

"Supreme Court, Tuesday, May 2, 1889.

D. B. Miller,
vs.
John Swann, Trustee, et al. } 6 Div. 857.

In this cause, the death of appellant being suggested and shown to the Court, it is ordered that leave be granted to re-

vive the suit in the names of the proper parties when made known."

"Supreme Court, Monday, December 9, 1889.

D. B. Miller, vs. John Swann, et al. } 6 Div. 857.

Come the appellant, by attorney, and moves the Court to revive said suit, and said motion is submitted for decision."

There was no judgment reviving the case, and there is nothing in the record to show that "the proper parties" names were ever "made known" to the Court.

On May 2d, 1890, a final judgment was rendered in the Supreme Court affirming the decree of the Court below, from which the case is brought here by the executor and heirs of D. B. Miller by writ of error.

The Code, 1886, of Alabama, Sec. 3656, provides:

"Upon the death of either party to an appeal being suggested, if the cause cannot proceed without new parties, the cause may be revived, either for or against such party, on the production of letters testamentary or of administration; but citation must issue from the appellate Court to all who are thus made defendants, unless they appear and waive it."

It is by virtue of this statute that the death of D. B. Miller was suggested and motion made to revive said suit. Notwithstanding the judgment entry in said Court recites "Come the parties, by attorneys, etc.," there not appearing by the record any party appellant, to come, such recital and such judgment are not effectual for any purpose. Under the terms of the statute, the appeal could be revived only "on the production of letters testamentary or of administration," and as to whether such letters were ever produced is left wholly to conjecture, the record being silent as to such fact which is relied on as authorizing a revivor, as well as being silent as to whether any revivor was ever made.

A revivor of a suit can be shown only by the record of the court in which it is made.

Pope, Admr, vs. Irby, 57 Ala. 105.

In ex-parte Sayre (69 Ala. page 186), the Supreme Court of Alabama, in construing a similar statute to the one under consideration, used the following language:

"As to the attempt to revive against the personal representative, should there be a wish to proceed only for mesne profits or rent, the petitioner is in no better condition. The motion was to revive against the personal representative, not the personal representative when known. The implication from this is that a personal representative had already been appointed. Now a proceeding against the personal representative, without more, is a proceeding against no one. [2. Brick. Dig. 132, Ss 10, 11, 12, 13.] More than five years had elapsed since Mr. McDonald's death had been made known, and the name of the personal representative was never brought to the attention of the Court. This cannot be regarded even as a motion to revive. Lest we might be misunderstood, we will add, there might possibly be cases in which, the motion being made in time, the mover might not be able to ascertain the name of the personal representative within the eighteen months, by reason that through delays of litigation, none may be appointed within that time. Whether this would be an excuse or not, we need not positively decide; but there are strong reasons in support of it. To make it available, however, the record should disclose the facts. The law favors speedy trials, and speedy revivors, as a necessary corollary."

It is intimated in the case quoted from, that a motion is good, as such, that seeks a revivor against a personal representative not yet appointed but who is to be nppointed in future, if the motion is to revive against him "when known;" but it is clearly held that if the personal representative is known, his name must appear in the motion or it "cannot be regarded even as a motion to revive." The motion made in the Supreme Court of Alabama to revive the case under consideration, comes directly within what the Supreme Court, in the case quoted from, holds "cannot be regarded even as a motion to revive." Where a plaintiff or appellant in a cause, desires to revive against a defendant, or appellee, it

may be, as suggested, that the names of the parties against whom a revivor is desired are not known, and cannot be ascertained, and in such a case it is intimated, that a motion to revive against such person, "when known," would be a sufficient motion upon which a revivor could be had. But that is not this case. Here it is attempted to sustain a motion to revive a case made by the identical persons in whose favor the revivor was sought, and it cannot be said that the movants were unknown to themselves, so as to obviate the rule laid down in the case supra. If no executor of D. B. Miller's will had qualified, then there was no motion to revive said suit in his favor, because no one was authorized to represent him. If the heirs were unknown to the party making the motion, then the reasonable presumption is that they were not the movants. The record shows on its face that it was the appellant (who was dead at the time) who moved a revivor of the cause. "Appellant" certainly can not refer to any of the plaintiffs in error, as they were not parties to the record then, nor are they now so far as the record shows.

Even if a proper motion had been made to revive the case, there is no case until revivor is actually made. It may be contended that a revivor will be presumed in order to support the judgment of the Supreme Court, but the answer to such contention is, that the record must show the revivor (Pope vs. Irby 57 Ala. 105); and that no presumption is ever indulged that a record of a court shows any fact not disclosed by the record itself on an inspection of it.

Weatherhead vs. Barkersville, 11 Howard 329.
Shaffer vs. Gates, 38 Am. Dec. 164.
Hathaway vs. Clark, 5 Pick. 490.
Hudson vs. Hudson, 20 Ala. 364.
Dabney vs. Mitchell, 54 Ala. 196.

A writ of error sued out against John Swann, deceased, as defendant, cannot be sustained.

Respectfully submitted.

John A. W. Billups

Attorney for Movant, John A. Billups.

Office Supreme Court U. S.
FILED
MAR 18 1888
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

Term No., 623.

REUBEN B. MILLER ET AL

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES, AND OTHERS.

Brief of W. Hallett Phillips in Opposition to Motion to Dismiss.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

Supreme Court of the United States.

Term No., 623.

REUBEN B. MILLER ET AL

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES, AND OTHERS.

Brief of W. Hallett Phillips in Opposition to Motion to Dismiss.

The main ground of the motion ~~was~~ is that the cause is not properly revived in the court below.

The appeal to the supreme court of the State was taken by D. B. Miller. The cause was pending there at the time of his death.

On May 2, 1889, the death of appellant being suggested and shown to the court, it was ordered that leave be granted to revive the suit in the name of the proper parties when made known.

On December 9, 1889, the motion to revive in the name of the representatives and heirs of D. B. Miller was submitted to the court.

On a subsequent day the cause was argued.

On an affirmance of the judgment, an application for a writ of error was filed in the name of the proper representatives and heirs of D. B. Miller and allowed by the chief justice of the State supreme court. A bond was signed by such representatives, approved, and the case docketed here in their names on December 4, 1890. The objection now made for the first time, is not that the proper parties do not appear on the record, but that the record fails to show a formal order of the supreme court of Alabama entered on the application to revive the cause.

While the entry of such an order would have been more formal, this Court will not permit such an omission on the part of the court, to invalidate the writ of error.

A formal entry was not essential. In point of fact the proper parties were before the court when final judgment was entered, and they were recognized as entitled to bring the case here.

If there was any further action necessary in order to have the parties appear more formally on the record, this Court will not dismiss the writ of error, but will make such order in the premises as may be needful.

The Court will hardly deem any further order desirable.

By the ninth section of the act of March 3, 1875, it is provided—

"That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceeding. The representatives of such deceased party may file in the office of the clerk of such circuit court a duly certified

copy of his appointment, and thereupon may enter an appeal or bring a writ of error, as the party he represents may have done."

18 Stat., 79.

This act, in terms, refers only to the judgments or decrees of the circuit court; but no reason appears why its provisions should not equally embrace writs of error to the State courts.

The right to control the mode of exercising the jurisdiction of the Court, is as absolute in cases brought from the State court, as in those coming from the circuit court of the United States.

Rule 15, subdivision 3, of this Court, itself speaks only of the judgment and decree of the circuit court, but it has never been doubted that such rule in all its parts applies to judgments and decrees of the State court as well as to those of the circuit court.

Various other objections are made to the writ of error, none of which we think are substantial. It is said that it does not appear that the citation was served on certain parties who were named, but no appearance has been made for such parties as yet, nor does the attorney who now makes the objection make it on behalf of such parties. Citation is simply notice and may be waived by the appearance of the parties.

The real defendants are the trustees, Swann & Billups, who hold the legal title, which it is the object of the suit to divest. The defense by all parties was the same. (Record, p. 78.)

Phelan was not made a party because a *pro confesso* was

entered as to him, and his title is the same as that represented by plaintiffs in error here.

It is also said that citation was not served on the trustees; it was, however, served on their attorney. (Record, p. 249.)

A point is also made that Swann, one of the trustees, was dead at the time the writ of error was sued out. An affidavit is produced to show that Swann died on September 20, 1890. The writ of error was sued out, October 9, 1890.

An act of the legislature of Alabama is produced, which was not passed until November 29, 1890, appointing Frank Y. Anderson as trustee in the place of Swann, deceased, and he is authorized to perform the trust with the surviving trustee, Billups.

The cause of action survived against Billups and the writ of error was therefore effective.

It is not necessary to make the heirs or representatives of a deceased defendant parties to the record where a cause of action survives as to a co-defendant.

McKinney *vs.* Carroll, 12 Pet., 71.
Moses *vs.* Wooster, 115 U. S., 287.

Section 16 of the act of March 3, 1875 (18 Stat., 470), provides, that if a party in whose favor a judgment or decree is rendered has died before writ of error is taken, notice to his representative shall be given from the Supreme Court, as provided in the case of a death of a party after writ of error.

If the Court should deem it important to have the new trustee made a party, we ask that an order to that effect should be granted.

W. Hallett Phillips,
For Plaintiffs in Error.

Brief of Plff. in Error.
on Motion to dismiss Writ of Error

Office Supreme Court U. S.
FILED.
MAR 13 1893
JAMES H. McKENNEY,
CLERK.

CASE, No. 14,435.

Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM No. 623.

REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, AND REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER AND IRVING MILLER, HEIRS OF D. B. MILLER, DECEASED, *et al.*, PLAINTIFFS IN ERROR,

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES, AND OTHERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

ELLIS PHELAN,

Attorney and Solicitor for Plaintiffs in Error.

Argument of Attorney for the Plaintiffs in Error, on the Motion to Dismiss the Writ of Error.

The plaintiffs in error contend that the record shows that the suit was revived in the name of Reuben B. Miller, executor of D. B. Miller, deceased, etc., in the Supreme Court of Alabama.

On the second day of May, 1889, the death of D. B. Miller was suggested and shown to the Court, and leave granted to revive, printed record, page 239. On December 9, 1889 (at the next term of the court), there is the minute entry of the submission of the motion to revive for decision, page 239, and on the next day, December 10, 1889, the cause was argued and submitted for a decision, page 240. On the second of May, 1890, the cause was decided, page 240. On the ninth of October, 1890, a writ of error from the Supreme Court of the United States was issued in the case, and in this writ the case is stated as being "between Reuben B. Miller, as the executor of D. B. Miller, deceased, and the said Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, the heirs of said D. B. Miller, *et al.*, plaintiffs in error, and John Swann and John A. Billups, trustees, etc., defendants in error," page 245.

In the appeal bond (page 244) the cause is stated in still plainer terms, giving the identical date of the judgment entry, May 2, 1890, and the name and style in which it was docketed. This bond was approved by Chief Justice George W. Stone. The writ of error was allowed by him (copy page 245, original page

247, printed record). The citation is to the same effect. Copy page 246, original citation page 248, printed record.

The certificate of the Clerk of the Supreme Court of Alabama, attached to the record (printed record, page 247), settles the question. He certifies that "the foregoing pages, numbered from 1 to 383 inclusive, contain *a full, true, complete, and perfect transcript* of the record and proceedings of said Supreme Court in the cause lately pending in said Court, wherein D. B. Miller was appellant, and John Swann, *et al.*, trustees, etc., were appellees," etc.

Included in these pages are the appeal bond, the writ of error, and the citation, all bearing the signature and approval of the Chief Justice of the Supreme Court of Alabama, and the official filing by the Clerk of said Court.

The transcript, therefore, as certified to by the Clerk of the Supreme Court of Alabama, shows beyond cavil or doubt that Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, the heirs of said D. B. Miller, had become parties to the record as plaintiffs in error in the place of D. B. Miller, the original complainant and appellant, whose death had been suggested and shown to the Court on the second day of May, 1889.

There is no necessity for invoking the doctrine of presumption as to the revivor; the record, certified to as above by the Clerk, shows the fact, and all the Supreme Court of the United States has to do is to accept it as true.

But if the doctrine of presumption has to be in-

voked to show a revivor in this case, under it the Court will presume a revivor. "There is always a legal presumption, in favor of the regularity of the proceedings of every court while acting within its jurisdiction."

People vs. Nevins, 1 Hill, 154.
Hart vs. Seixas, 21 Wend., 40.
Ormsbee vs. Davis, 16 Conn., 578.

Section 3656 of the Code of Alabama, page 775, is as follows: "On the death of either party to an appeal being suggested, if the *case cannot proceed without new parties*, the cause may be revived, either for or against such party, on the production of letters testamentary, or of administration, but citation must issue from the Appellate Court to all who are thus made defendants, unless they appear and waive it."

Rule 36, Rules of Practice, Supreme Court (Code of Alabama, page 805) is as follows:

"When the death of a party has been suggested, and an order made to revive in the name of or against the heirs, or personal representatives of the deceased, and this is not done by the next term of the Court, *the suit shall abate*, unless for sufficient cause shown, the Court shall extend the time."

The minute entry of the ninth of December, 1889, reads: "Came the Appellant, by attorney, and moves the Court to revive said suit, and said motion is submitted for a decision." Page 239.

Is it possible to imagine that the Appellate Court of the State of Alabama would have taken under ad-

visement such a motion without it was furnished with the necessary *data* to make the decision, viz., "the production of letters, testamentary or of administration?" In this case, it was not only furnished with evidence that Reuben B. Miller was the executor of said D. B. Miller, deceased, but the names of his heirs were also furnished.

Any other hypothesis would make the Supreme Court of Alabama appear ridiculous. It also places the Chief Justice of the Supreme Court of the United States in a very awkward position. It is presumed that a writ of error bearing the authority of the President of the United States, under the name of the Chief Justice of the United States, will not be negligently or carelessly used; and the Statutes of the United States have wisely provided that when issued to a State Court the "citation shall be signed by the Chief Justice," etc. Revised Statutes, U. S., Section 999. Chief Justice Stone allowed this writ. See original, printed record, page 247. He approves the appeal bond and issues the citation to the defendants. The appellants, Reuben B. Miller, executor, and the heirs go forward; they pay out their money to have the notice of appeal served, page 249. They have the record copied and the Clerk of the Supreme Court of Alabama, under his hand and the seal of the Court, certifies that "the foregoing pages numbered from 1 to 383 inclusive, contain a full, true, complete, and perfect transcript of the record and proceedings of the said Court in the cause lately pending in said Court, wherein D. B. Miller was appellant," etc.

The reviving of a suit is very simple under the

Alabama statutes. Section 3656, code of Alabama, quoted above.

It is not to be presumed that the Supreme Court of Alabama deliberately broke one of its rules. Rule 36, quoted above. On May 2, 1889, of the December term, 1888, the death of D. B. Miller was suggested and leave given to revive.

At the next term, December 9, 1889, the appellant appeared, by attorney, and submitted a motion to revive for decision, and on the very next day the minute entry is: "Came the parties, by attorneys, and argue and submit this cause for decision."

D. B. Miller's death had been shown to the Court on May 2, 1889, and he could not have appeared by attorney. It must mean that his legal representatives, as shown in this record, appeared by attorney or the record is senseless, and so of the minute entry of May 2, 1890, when the Court, through Somerville, J., handed down its opinion (page 240).

The record shows that the object of the complainant and appellant, D. B. Miller, was to obtain a title to real estate, included in the act of Congress, 1856 and 1869, to aid in the construction of the Alabama and Chattanooga railroad, and when his death was suggested and shown, the very first principles of our laws required a revivor in the name of his representative and heirs. Alabama has followed the common law on this subject. The cause could not have proceeded (Section 3656 *supra*) without new parties complainant (appellant in the Supreme Court of Alabama). And to say that this suit was not revived in the name of D. B. Miller's executor, and his heirs, is to convict the Supreme Court of Alabama of proceeding in this

case in the very teeth of the statute above quoted and of its own Rule of Practice.

It was expected that this cause would ultimately be taken to the Supreme Court of the United States. (Agreement of counsel found on pages 38–39, printed record). Under the most favorable circumstances a lifetime is too short to litigate a cause through the State Court and the Supreme Court of the United States. This long and expensive road should not be further impeded by pure technicalities that impeach the record and make the Supreme Court appear in the light of ridicule.

ELLIS PHELAN,

Attorney and Solicitor for Plaintiffs in Error.

The foregoing brief was prepared under the impression that the motion to dismiss was only on the question of revivor.

In addition to the statement as to the manner in which the record was made up, plaintiffs call the attention of the Court to the agreement of counsel on pages 38 and 39, of record.

As to the objections raised in No. 1 a, of defendant's motion, plaintiffs in error say they are fully answered in the foregoing argument.

As to those set forth in No. 1 b, the record shows that the interest of defendant, Phelan, was identical with that of the original complainant, D. B. Miller. In fact he had no interest, having a pure quit-claim to the surface right of one forty acres (record, page 119). Even if Miller's title was perfected, it would not enure to Phelan's benefit. Such is the law of Alabama. Swann and Billups were particularly careful to put Phelan in the same boat with Miller. The injunction asked for was not insisted on, and the prayer of the bill was that the title to the land in controversy be vested in Orator D. B. Miller (record, pages 49 and 50). The Chancellor, in his first decree, so treated the case (record, pages 233 to 236).

Swann and Billups took an appeal from this decree (record, pages 237–238).

It is hardly to be supposed that Phelan would have united in this appeal which, if successful, would destroy all hope on his part. The Supreme Court decided in favor of these Trustees (82 Alabama, 530). D. B. Miller amended his bill, and this time the

Chancellor decided against him and dismissed the bill (record, page 38). D. B. Miller then took an appeal. Smith and Lowe, solicitors, accept service for defendants, except Phelan (page 40). There was no notice to Phelan, or any waiver of notice. The cause was again tried in the Supreme Court of Alabama and decided (record, pages 239 to 244).

The Court will presume that these proceedings were regular. It will not presume that Phelan deliberately made himself an actor to cut his own throat. Rather it will presume that his rights, if he had any, were merged in Miller, or that the cause was dismissed as to him, or that there was a summons and severance, a practice very common in Appellate Courts. Otherwise, the proceedings in the Supreme Court of Alabama would not have been regular (section 3631, Code of Alabama).

As to W. S. Winsted.

The answer of Swann and Billups shows that he was their tenant (record, page 74), and it was their duty to protect him (Code of Alabama, section 2700). The record shows that the whole burden of the defense was undertaken by the Trustees. There was no claim for rent in arrear, or otherwise, and the answer of Swann and Billups shows that Winsted had no interest in this suit.

But if the question becomes important the Court will presume that the cause was dismissed as to him, for in taking the second appeal (page 40, of the record), there is nothing going to show that he was a party to the appeal. The presumption is in favor of the regularity of the proceedings.

As to the objections in Nos. 2 and 3, the record shows that the citation was served on "D. D. Smith, of the firm of Smith & Lowe, Attorneys" (record, pages 246-249). This firm were the attorneys of record of the respondents; see pages 6, 9, 39, 40, of record. This firm was also attorney for Swann and Billups.

Section 2736, of Code of Alabama, is as follows: "Written notice to the attorneys of record is as effectual as notice to the party to be effected by it."

As to the objections Nos. 4 and 8. John Swann and John A. Billups were appointed under the authority of the Act of February 23, 1876. Acts of Alabama, pages 130 to 149. See also deed of George S. Houston, governor to them (record, pages 75 to 78).

By Section 19, of said act, "Vacancies in the said Trusteeship shall be filled by the Governor, or said bondholders as may then have surrendered their bonds, as the case may be, in the manner provided for the original appointment of said Trustees."

If there is anything in this point, the Supreme Court will cite F. Y. Anderson (who claims to be the successor of Swann) in as a party defendant. The act was approved November 29, 1890. The writ of error bears date 9th October, 1890.

As to the objections 6 and 7. The words *et al.*, found in the writ of error, are purely surplusage and meaningless, and should be so treated. The record shows that D. B. Miller was the sole complainant in the Chancery Court and appellant in the Supreme Court of Alabama, and the record further shows that Reuben B. Miller, executor of D. B. Miller, deceased,

and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, *heirs of said D. B. Miller*, were the plaintiffs in error (appellants in the Supreme Court of Alabama), and they are the parties who claimed to be damaged by the decision, "as by *their complaint appears.*" It is perfectly apparent from this record that D. B. Miller was the sole complainant and appellant, and on his death the suit was revived in the name of his executor and heirs. In the cases, cited by the attorney for motion, the words "*et al.*," "and others," represented real living parties to the record. Here they mean nothing, represent no one, and evidently got into the writ through mistake or carelessness.

If the certificate of the Clerk of the Supreme Court of Alabama is not as clear and explicit as it might be, doubtless the Supreme Court of the United States may require him to amend it or make it clearer, but plaintiffs contend that it is sufficient.

ELLIS PHELAN,

Attorney and Solicitor for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
MAR 1 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892

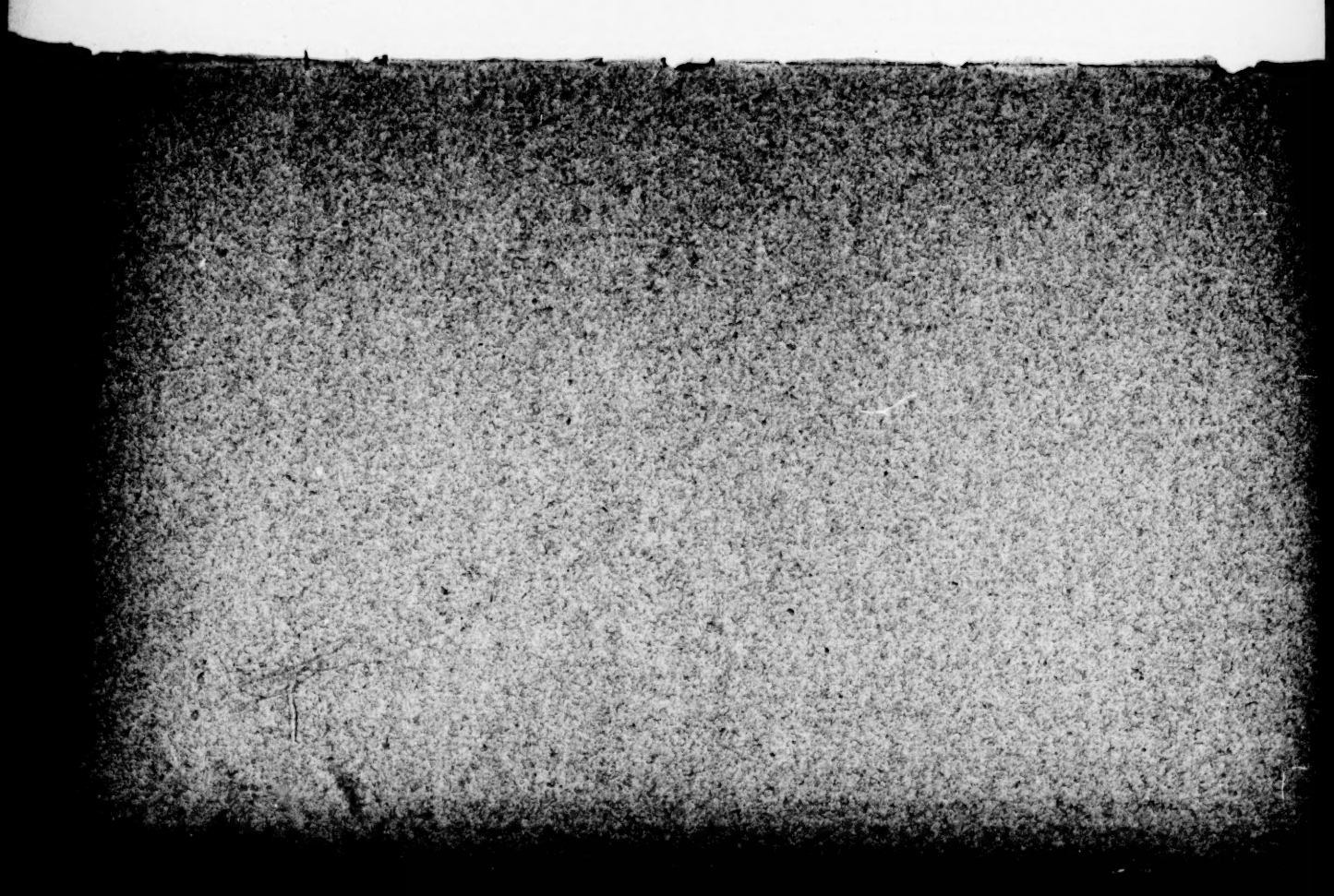
Term No., 623.

REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, AND REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER, AND IRWING MILLER, HEIRS OF D. B MILLER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES; W. J. VAN KIRK, JOHN N. JENKINS, E. A. TAYLOR, AND JULIA B. BERRY, DEFENDANTS IN ERROR.

JOHN A. W. SMITH,
Attorney for Defendant John A. Billups.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892

Term No., 623.

REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, AND REUBEN B. MILLER, CLIFFORD N. MILLER, HUGH MILLER, DUDLEY MILLER, AND IRWING MILLER, HEIRS OF D. B. MILLER, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES; W. J. VAN KIRK, JOHN N. JENKINS, E. A. TAYLOR, AND JULIA B. BERRY, DEFENDANTS IN ERROR.

Comes John A. Billups, one of the defendants in error in the above-styled case, and moves the Court to dismiss the said cause, and assigns as grounds for this motion the following:

1. There is a variance between the writ of error and the record sent up from the supreme court of Alabama in response to it, in this:

a. The writ of error is sued out in the name of Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irwing Miller, *et al.*, as plaintiffs in error, against John Swann and John A. Billups, trustees, and W. J. Van Kirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry, defendants in error (see Record, page 247), and the record sent up in response to said writ is in a "cause lately pending in said (supreme) court (of Alabama), wherein D. B. Miller was appellant and John Swann *et al.*, trustees, etc., were appellees." (See clerk's certificate on page 247 of Record.)

b. The said writ of error is sued out in the name of Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irwing Miller, heirs of D. B. Miller, deceased, *et al.*, as plaintiffs in error, against John Swann and John A. Billups, trustees; W. J. Van Kirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry, as defendants in error, and the record sent up in response to it is one lately pending in the supreme court of Alabama, wherein D. B. Miller was appellant (see original bill on page 41 of Record, where D. B. Miller is complainant) and John Swann and John A. Billups, trustees, and W. J. Van Kirk, John M. Jenkins, Julia B. Berry, E. A. Taylor, W. S. Winstead, and Ellis Phelan were appellees. (See Record, page 49, where said parties are made defendants to said bill, and page 39, where the complainant D. B. Miller appealed, not giving names of appellees, whereby all defendants are made appellees. See also page 79, decree *pro confesso* against Ellis Phelan, and page 78, where W. S. Winstead and other named defendants answered.) (The decree of the chancery court from which the appeal was taken to the supreme court of Alabama is shown on page 38 of Record. The final judgment of the supreme court of Alabama is shown on page 240 of Record. Neither Ellis Phelan nor W. S. Winstead was made a party to the said writ of error.)

2. It is not shown by the record that any citation has ever been served upon W. J. Van Kirk, John N. Jenkins, E. A. Naylor, or Julia B. Berry, defendants in error.

3. It is not shown that citation was ever served on John Swann, trustee.

4. At the time of the service of citation on D. D. Smith as the attorney for John Swann, trustee, the said John Swann was dead, as shown by affidavits hereto annexed.

5. The record shows (on page 239) that in the said cause sent up in response to said writ of error "the death of the appellant (D. B. Miller) was shown to the court" before any final decision of said cause by said supreme court of Alabama, and before the same was submitted to the court for its decision and leave was given to revive, but the record fails to show that any revivor was ever made.

6. The record shows D. B. Miller's death and fails to show a revivor, or that the names of his representative or heirs were ever furnished to the supreme court of Alabama, so that revivor could be made.

7. The appellant in the cause in supreme court of Alabama, D. B. Miller, being dead at the time of the submission of said cause and the rendition of the judgment in that court and there having been no revivor, said judgment of the said supreme court is void and will not support a writ of error in the name of his executor and heirs.

8. Defendant in error John Swann died prior to the suing out of the writ of error in this cause, as is shown by the affidavits of Prescott Hall Butler and F. Y. Anderson, hereto annexed, and Frank Y. Anderson was duly appointed the successor of said John Swann as such trustee, as is shown by a certified copy of an act of the General Assembly of Alabama, hereto annexed, and said cause has never been

revived against said Frank Y. Anderson as the successor of said John Swann, trustee, deceased, nor against John A. Billups as surviving trustee.

JOHN A. W. SMITH,
Attorney for Defendant John A. Billups.

THE STATE OF ALABAMA, }
Jefferson County. }

Personally came before me, John H. Wallace, a notary public in and for said county, Frank Y. Anderson, who, being duly sworn, deposes and says that he was personally acquainted with John Swann, who is named as a party defendant in case No. 14435 (term No., 623), of Reuben B. Miller, executor of D. B. Miller, deceased, and Reuben B. Miller, Clifford N. Miller, Hugh Miller, Dudley Miller, and Irving Miller, heirs of D. B. Miller, deceased, *et al.*, plaintiffs in error, *vs.* John Swann and John A. Billups, trustees; W. J. Vankirk, John N. Jenkins, E. A. Taylor, and Julia B. Berry; that said John Swann is dead, but as to the exact date of his death affiant does not know, except as is shown by the affidavit of Prescott Hall Butler, which is hereto annexed. Affiant further states that said John Swann and John A. Billups were trustees appointed by the authority of the General Assembly of Alabama, and as such were invested with the title to the lands in controversy in the case mentioned, with active duties to perform in relation thereto; that affiant was in the employment of said trustees and in a business way had a great deal of correspondence with said John Swann; that he (said John Swann) resided in Stockbridge, Massachusetts, and affiant verily believes that he is the identical John Swann mentioned in the affidavit of Prescott Hall Butler, hereto annexed, as having died on September 20, 1890. Affiant further states that he is the successor of said John Swann as such trustee, having been duly appointed

by act of the General Assembly of Alabama, which said act is also annexed hereto.

FRANK Y. ANDERSON.

This 17th day of February, 1893.

[SEAL.] JOHN H. WALLACE,
Notary Public, Jefferson County, Alabama.

THE STATE OF NEW YORK, }
County of New York, } *ss:*

Personally came before me, William R. Montgomery, a notary public in and for said county, Prescott Hall Butler, who, being by me first duly sworn, on oath says that he was personally acquainted with John Swann, who resided in the city of Stockbridge, Massachusetts, and that, to his knowledge, the said John Swann is dead; that he died on the twentieth day of September, 1890.

PRESCOTT HALL BUTLER.

Sworn to and subscribed before me this eighteenth day of February, 1892.

[SEAL.] WM. R. MONTGOMERY,
Notary Public, New York County.

AN ACT (H. B. 108.)

To fill the vacancy caused by the death of John Swann, one of the trustees under the act approved February 23, 1876.

Whereas under and by virtue of the provisions of an act approved February 23, 1876, John Swann was appointed by the bondholders and John A. Billups was appointed by the governor as trustees in that behalf; and

Whereas, in pursuance of the provisions of said act, George S. Houston, as governor of Alabama, did, by deed of date February 8, 1877, convey to said John Swann and John A. Billups, as such trustees, the property therein described; and

Whereas by an act approved February 20, 1883, the General Assembly declared that the said John Swann and John

A. Billups, as such trustees, are entitled to certain lands therein described; and

Whereas the said John Swann has departed this life without fully discharging said trust: Now, therefore,

Be it enacted by the General Assembly of Alabama that Frank Y. Anderson, of Birmingham, Alabama, be, and he is hereby, declared and appointed trustee in this behalf in the place of said John Swann, deceased.

Be it further enacted that the said John A. Billups and Frank Y. Anderson be, and they are hereby, authorized and empowered to perform all acts, execute all powers, carry out all contracts made by said John Swann and John A. Billups as such trustees, sue and be sued, and manage said trust estate in the same and as ample a manner as the said John Swann and John A. Billups might have done in the lifetime of said Swann.

Be it further enacted that all laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

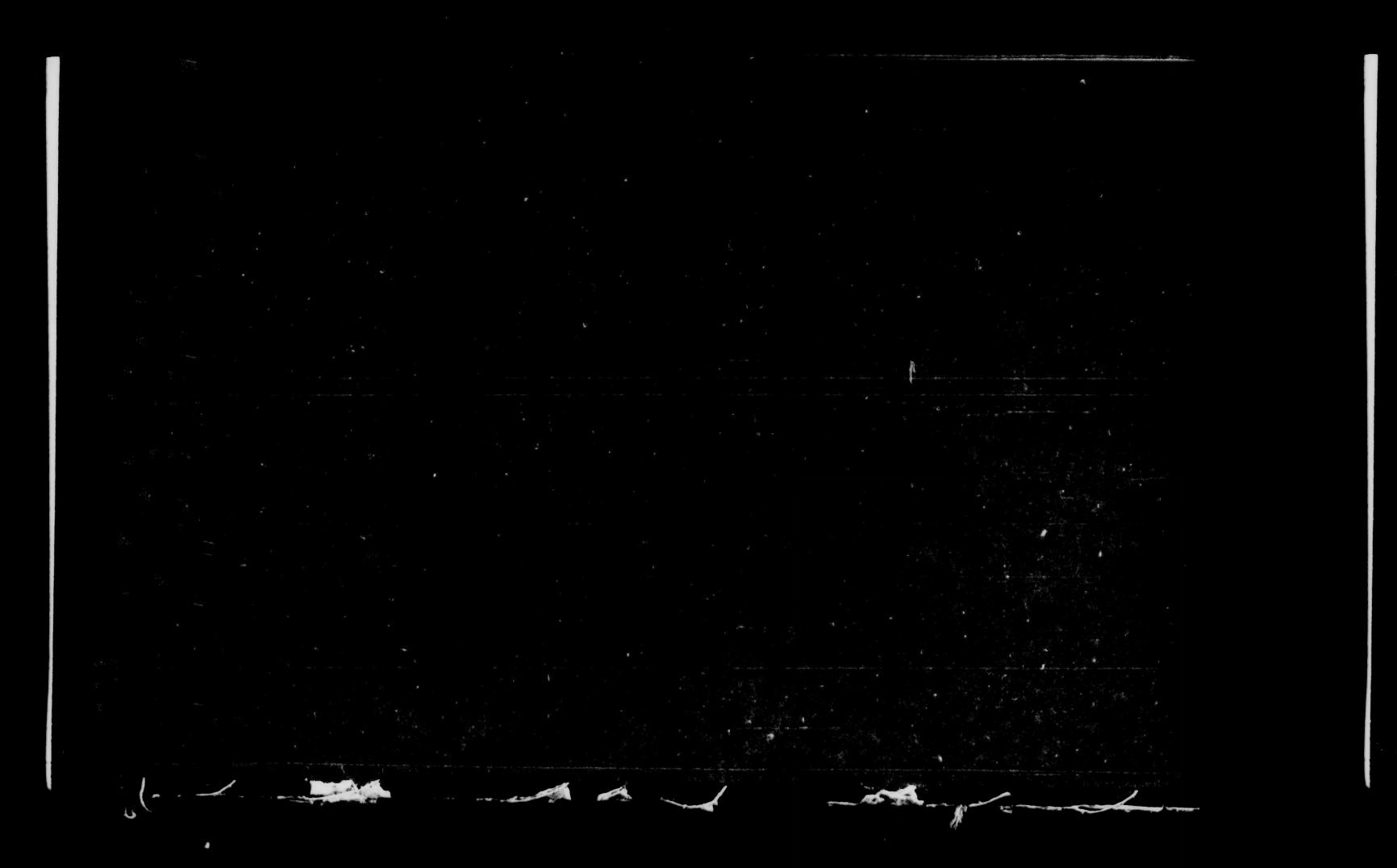
Approved November 29, 1890.

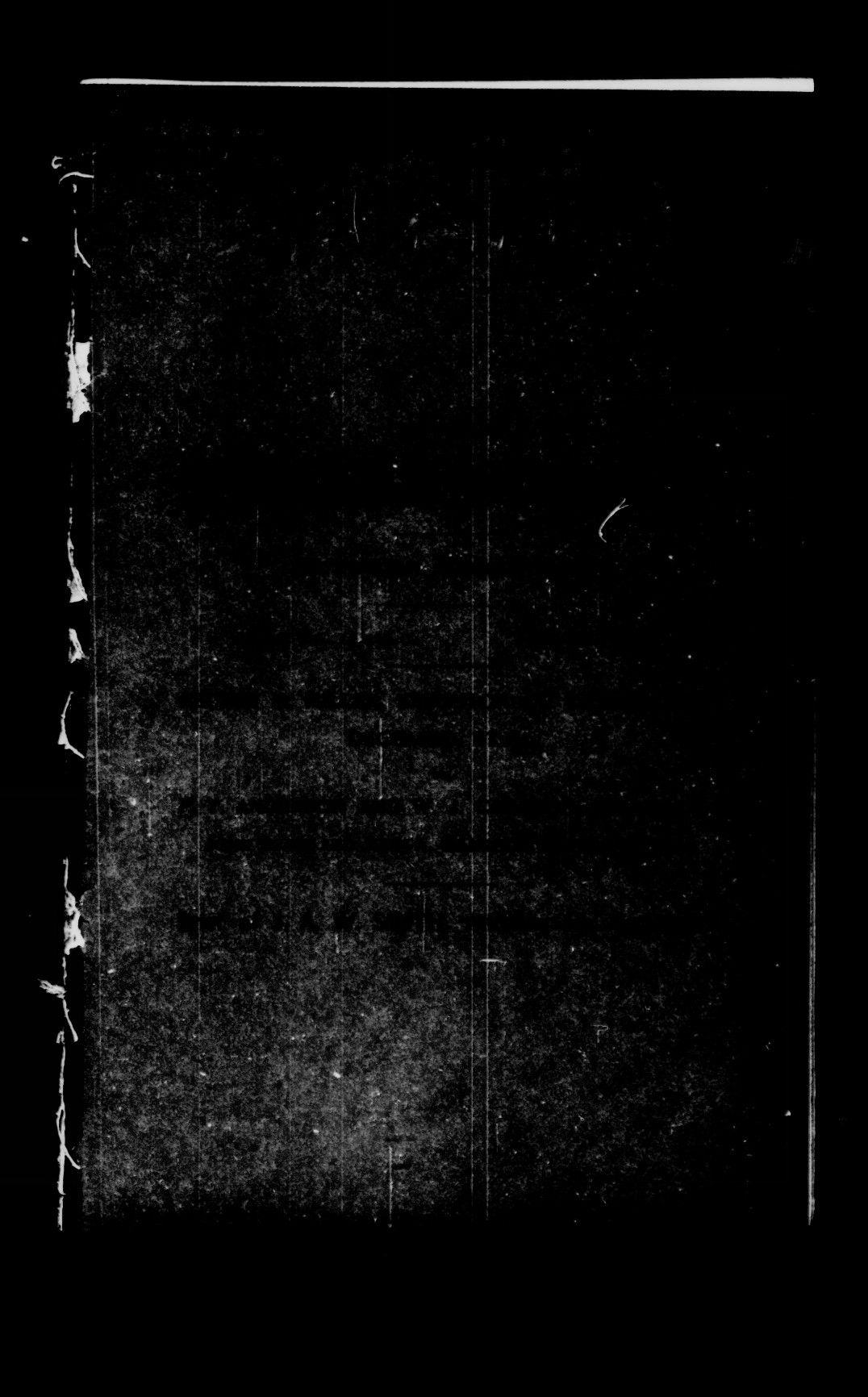
I, J. D. Barron, secretary of state, do hereby certify that the above is a true and correct transcript of the act to fill the vacancy caused by the death of John Swann, &c., as the same is found on pages 8 and 9 of the Session Acts of the Session of the General Assembly of Alabama of 1890–'91, now in my office.

Witness my hand and the great seal of the State, at the capitol, in the city of Montgomery, this 17th day of February, A. D. 1893.

[SEAL.]

J. D. BARRON,
Secretary of State.





INDEX.

PAGE

Case made by pleadings 1-6a
by the bill 1- 6
by the answer 6-6a

The Facts 6b-6c

Decision of State Court is based on construction of local law, not involving Federal question 6d-10

Case of St. Louis, Iron Mountain & Southern Railroad vs. McGee, discussed 10-13

Federal question involved 13-23

Questions of unauthorized sales, the statute of frauds, ratification, estoppel and laches, discussed 23-47

Swann & Billups vs. Miller (82 Ala., 530) Appendix 48

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Case No. 14,435. Term No. 362.

REUBEN B. MILLER, EXECUTOR OF D. B. MILLER, DECEASED, ET AL,

vs.

F. Y. ANDERSON AND W. J. CAMERON, Successors to JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES, ET AL.

Brief of J. A. W. SMITH, Attorney for Appellees.

CASE MADE BY THE PLEADINGS.

This case was brought here from the Supreme Court of Alabama, by writ of error, to review the judgment of that Court, affirming the decree of the Chancery Court of Alabama.

The original bill (Record, pp. 41–50) was filed by D. B. Miller against John Swann and John A. Billups, as trustees, and the other defendants in error, on the 15th day of July,

1884. Since the filing of the bill, D. B. Miller, John Swann and John A. Billups have died, and the case now stands in this Court in the name of Reuben B. Miller, as executor, and others, heirs of D. B. Miller, vs. Frank Y. Anderson and W. J. Cameron, as successors to Swann and Billups, and the other original parties defendant.

The object sought by the bill is to enforce the specific performance of two alleged contracts for the sale of lands, one alleged to have been made on the 13th of September, 1870, and the other on January 24, 1871, by and between one Joab Bagley, under whom plaintiffs in error claim, and the Alabama & Chattanooga Railroad Company; also to enjoin an ejectment suit for the recovery of the land. Swann and Billups, as trustees, succeeded to the title of the Alabama & Chattanooga Railroad Company. Some of the land had been sold off to other defendants before the original bill was filed. The Alabama & Chattanooga Railroad Company is not a party to the suit. The original bill alleges that by the acts of Congress therein mentioned (the act of June 3, 1856, 11 U. S. Statutes at Large, pp. 17 and 18; and the act of April 10, 1869, in renewal thereof,) the lands here in controversy, with other lands, had been granted to the State of Alabama to aid in the construction of two railroads, which, under the act or acts of the Legislature of Alabama of October 6, 1868, and of November 17, 1868, were consolidated and became known as the Alabama & Chattanooga Railroad; that long *before the completion of that railroad*, and on February 11, 1870, the act of the Legislature was approved, whereby a loan of two millions of dollars of the bonds of the State to the Alabama & Chattanooga Railroad Company, to expedite the construction of its railroad, was authorized to be made upon the execution by said company of such a mortgage as was subsequently executed by it to the State; that said loan and mortgage were accordingly made on

March 2, 1870; that said mortgage, embracing said granted lands, was duly recorded in the county in which the lands in controversy are situated, and that the mortgage debt to the State secured by said mortgage has not been paid.

In the bill (Record, page 46) it is alleged: "That the said Alabama & Chattanooga Railroad Company failed to pay the said money back to the State of Alabama according to the terms of said mortgage and made default; that, on the petition and at the suit of W. A. C. Jones, then a creditor of the Alabama & Chattanooga Railroad Company, the said Alabama & Chattanooga Railroad Company was put in bankruptcy and was in said suit declared to be a bankrupt by the United States District Court sitting for the — of Alabama. The estate of the said Alabama & Chattanooga Railroad Company was administered in the said United States Court and all the lands covered by the said mortgage were sold by the decree of the said United States Court hereto, viz., —, and at said sale the State of Alabama bought the said lands, including the lands herein described as having been sold to Joab Bagley.

"That afterwards, heretofore, viz: on the 8th day of February, 1877, under the 'debt-settlement act' of the General Assembly, found on pages 130–49, Acts of 1875–6, approved the 26th of February, 1876, the State of Alabama conveyed to John Swann and John A. Billups, trustees, all the lands and property purchased by the State of Alabama at said bankrupt sale, and which the State claimed and held under the said mortgage of the said Alabama & Chattanooga Railroad Company to the State, including, amongst others, the land hereinbefore described as having been sold to the said Joab Bagley. The said conveyance to said John Swann and John A. Billups, trustees, was, however, subject to limitations and conditions therein named and likewise in the said debt-settlement act, and amongst other limitations and conditions were the following,

viz: But where sales of said lands or any portion thereof have heretofore been made to purchasers in good faith under the authority reserved to said railroad company, as stated in said act called the debt-settlement act, such trustees shall make the title thereto where not already made, but shall collect the purchase money therefor when not already paid and all sums, part of said purchase money, remaining unpaid and be entitled to all the securities for the payment thereof.

"That in the said mortgage made by the said Alabama & Chattanooga Railroad Company to the State of Alabama the right and privilege of selling the land covered by said mortgage was reserved to said Alabama & Chattanooga Railroad Company on condition that said company should appropriate the proceeds of said sales to the payment of the said first mortgage bonds—*i. e.*, the first mortgage bonds to the State of Alabama.

"A copy of said deed to said Swann and Billups, trustees, orator cannot set forth, the same not having been recorded and no copy thereof or duplicate thereof being found amongst the public or private papers belonging to the State of Alabama, but orator avers that said John Swann and said Billups, or one of them, has the original thereof and can produce the same, and orator prays that they may be required to produce the same or an accurate copy thereof be attached to their answer to this bill. (Copy attached to answer; see Record pp. 75-78.)

"That under an act of the General Assembly on the 23d of February, 1883, and found on pages 62, 63, 64, 65 and 66, Acts of 1882 and 1883, the said John Swann, in behalf of the bondholders mentioned in said last named act, compromised and settled with the State in accordance with said last named act by paying into the treasury of the State a large sum of money, viz: the sum of fifty thousand dollars. And thereupon the State, through its duly authorized officers and agents, re-

leased the said Swann and the bondholders from the payment of what was coming to the State under the contract with the State and said Swann and Billups.

"That the said Swann and Billups, trustees, accepted the said conveyance to them by the State of Alabama, on the condition that nothing contained in the conveyance should be construed to impair or affect any existing legal or equitable right of any purchaser who purchased any portion of said lands, viz., the lands covered by the mortgage of the Alabama & Chattanooga Railroad Company to the State of Alabama, in good faith, under and pursuant to the authority of an act of the Legislature of this State approved February 11, 1870, enentitled 'An act to loan the credit of the State to the Alabama & Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama;' and the said Swann and Billups accepted the conveyance to them with conditions in substance the same as to the rights of purchasers under the said Alabama & Chattanooga Railroad Company."

The said act of our State Legislature of February 11, 1870, the said mortgage and each of said acts of Congress are made and treated as parts of the bill of plaintiffs in error.

On November 8, 1887, after the case had been decided by the Supreme Court of Alabama upon the first appeal (82 Ala., 530 and appendix) complainant, D. B. Miller, amended his bill, and alleged that the Alabama & Chattanooga Railroad Company had completed its railroad, at the date of the alleged sales to Joab Bagley, from Wauhatchie, Tennessee, to a point in the direction of the Mississippi line in Jefferson county, Alabama, opposite to and beyond the lands in suit; that the railroad was completed on the 17th day of May, 1871; "that the said contracts of sale aforesaid * * * were made in accordance with the acts of Congress granting the same, and at the date

of said contracts of sale, as aforesaid, the requirements of said act had been complied with in all essential parts in such manner as to authorize the said contracts of sale by the said Alabama & Chattanooga Railroad Company; and if complainant is mistaken in the averment that said contracts of sale were made in accordance with the said act of Congress, meaning thereby a strict compliance with the letter of said statute, complainant avers and charges that said contracts of sale were made according to the true intent and spirit of said statute, and since the completion of said road, viz., on the 17th day of May, 1871, said contracts of sale have been fully ratified and confirmed by said railroad company, the State of Alabama and the said John Swann and John A. Billups."

Defendants in error, who were also defendants in the Court below, included in their answer several special pleas in defense of the suit. This practice is authorized by statute.*

Defendants pleaded:

1st. That the alleged sales by the Alabama & Chattanooga Railroad Company to Joab Bagley were not in accordance with, but were in contravention of the act of Congress of June 3, 1856, and therefore void and incapable of ratification.

2d. That the State of Alabama held a mortgage on the lands, executed by the Alabama & Chattanooga Railroad Company, to secure the State against loss for bonds of the State loaned to said company to aid in the construction of its railroad, which was duly recorded prior to the alleged sale to Bagley, and is unsatisfied; and that the said alleged sales by the mortgagor, the Alabama & Chattanooga Railroad Company, *were not authorized by the mortgagee, under the terms of the mortgage;* and that Swann and Billups, as *bona fide* purchasers

* Code of Alabama, 1886, sec. 3442 (3783 Code 1876), provides:

A defendant may incorporate all matters of defense in his answer, and is not required to plead specially in any case.

from the State, for value, and without notice, acquired the title to the lands, freed from any alleged equitable interest therein claimed by the plaintiffs.

3d. That the alleged sales are void under the Alabama statute of frauds†, in that they were not made by the Alabama & Chattanooga Railroad Company, by any corporate act of the company, and that the agent making the sales had no authority *in writing* from said Alabama and Chattanooga Railroad Company to make them; and that said Bagley was not put in possession of the land by the seller.

4th. That the complainant is barred by section 5057, Revised Statutes of the United States.

5th. That complainant is guilty of such *laches* as to disentitle him to the relief sought.

6th. The defendants, for answer, denied all the material allegations of the bill. They especially denied that the agent (Duffy) had any authority to make said alleged sales, or to receive any part of the purchase money therefor; and they especially denied that they, or that the Alabama & Chattanooga Railroad Company, or that the State of Alabama ever ratified or confirmed the said alleged sales.

---

† Code of 1886, sec. 1732 (Code 1876, sec. 2121).—CERTAIN CONTRACTS TO BE IN WRITING, ELSE VOID.

In the following cases, every agreement is void, unless such agreement or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing.

* * * * * *

5. Every contract for the sale of lands, tenements or hereditaments, or any interest therein, except leases for a term not longer than one year, unless the purchase money or a portion thereof be paid and the purchaser be put in possession of the land.

THE FACTS.

The lands in suit were granted to the State of Alabama to aid in the construction of the Alabama & Chattanooga Railroad and the South & North Alabama Railroad. Joab Bagley, under whom the plaintiffs in error claim, purchased the lands from one Daniel J. Duffey, whom it is claimed was the agent of the Alabama & Chattanooga Railroad Company, but who in fact had no authority from said railroad company to make sales of lands. (See Swann and Billups vs. Miller, 82 Ala., 537; also Appendix hereto, page 51.) Prior to the time Bagley purchased from Duffey, the Alabama & Chattanooga Railroad Company had mortgaged the lands to the State of Alabama. In the mortgage, which was authorized by act of the Alabama Legislature of February 11, 1870, it was provided "that the said Alabama & Chattanooga Railroad Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same; provided, however, that the proceeds of said sales shall be appropriated to the payment of the aforesaid first mortgage bonds of the said railroad company issued to the State." Record, page 65.

On the 8th day of February, 1877, the Governor of Alabama conveyed the lands, by virtue of the debt-settlement act, approved February 23, 1876, to John Swann and John A. Billups, trustees, in settlement of the debts secured by the said mortgage given to the State by said railroad company, as aforesaid, and assigned them the "deed of mortgage executed by said Alabama & Chattanooga Railroad Company to the State of Alabama, dated second of March, 1870," etc. Record, page 75.

The question arises, as it did arise in the State Courts, which has the better equitable right to these lands, plaintiffs

in error, who purchased from Bagley, or defendants in error, who have succeeded to the title of the Alabama & Chattanooga Railroad Company through a statutory foreclosure or assignment of the mortgage, given by said company to the State on March 2, 1870, in settlement of the debt secured by the said mortgage.

The Supreme Court of Alabama decided:

1st. That the testimony failed to show that Duffey had any authority to make the sales to Bagley and that they were of no legal effect in themselves, (Swann and Billups vs. Miller, 82 Ala., 537, and Appendix hereto, page 51,) and that no one but the State could ratify these invalid sales, and that this could be done only by legislative authority, which was never done. Record, page 243; 89 Ala., 637.

2d. That, even if the sales made by Duffey had been made by the Alabama & Chattanooga Railroad Company itself, that they were subsequent to the prior right of Swann and Billups, who purchased from *the State of Alabama* and acquired whatever right the State had acquired by the mortgage of March 2, 1870, which was prior in date to the alleged sales to Bagley.

ARGUMENT.

The questions of the conflicting claims of the purchasers from the mortgagee and the mortgagor, of ratification and of estoppel, decided by the State Court adversely to the plaintiffs in error, are questions of local State law, and in no sense Federal questions. The decision of the Supreme Court of Alabama is broad enough to show that the conclusion reached was from a construction of the laws of the State, independently of any Federal question.

In the opinion of the Court, on first appeal, it is said "The inquiry then is, did Bagley have an equitable title to these lands, by virtue of these contracts of sale, thus made with Duffy at the date specified?"

"The testimony fails to show that Duffy had any written authority from the railroad company to act as its agent in making these sales; nor is it shown that there ever was any vote of the board of directors, or any minute made of the corporate proceedings of this road, evidencing the appointment of Duffy as such agent. *The contracts of conveyance were, therefore, invalid and of no legal effect in themselves.*"

Swann and Billups vs. Miller, 82 Ala., 537, and Appendix hereto.

On last appeal (Record, p. 240) the Court said: "The facts of the case remain essentially unchanged.'

In addition to the Federal question which is presented by reason of the failure of the Alabama & Chattanooga Railroad Company to comply with the requirements of the acts of Congress granting the lands, the same failure to comply with the terms of these acts presents A QUESTION of the proper

construction of the statute of Alabama, giving to the mortgagor, the Alabama & Chattanooga Railroad Company, "the privilege or right of selling said lands, or any part thereof, in *accordance with the act of Congress granting the same.*"

Certainly the judgment of the State Court as to the right of the mortgagor to make sales of lands under this *State law*, in a controversy with the mortgagee or its vendees, ought to be final, and not subject to review by this Court.

The Supreme Court of Alabama decided that Swann and Billups acquired a title from the State, as mortgagee, which was superior to any claim of Bagley, who, it is claimed, purchased from the mortgagor, the Alabama & Chattanooga Railroad Company. This conclusion depends upon a proper construction of the *statute of Alabama*, and the mortgage executed, by virtue of the authority of such statute, to the State of Alabama, to secure the State, as the indorser of the bonds of the Alabama & Chattanooga Railroad Company, or as the lender of its own bonds, against loss. In the opinion of the State Court, it is said (Record, p. 242; 89 Ala., 636):

"Unless the lien of the mortgage was released, it is manifest that the title acquired under it would be superior to that acquired from the mortgagor, or, in other words, that Swann and Billups' title would be superior to Miller's. Wilson vs. Boyce, 92 U. S., 320.

"A mortgagor ordinarily has no power to sell the mortgaged property free of the incumbrance created by the mortgage. He may do so, however, if allowed by the contract of the parties, the rights of no creditors intervening, or he may be permitted to do so by express legislative authority. Such authority is claimed in this case.

"*The act of February* 11, 1870, *expressly permits a 'reservation'* to be made by the railroad company in the mortgage

to be executed to the State, providing that 'the said Alabama & Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same.' Acts 1869–70, pp. 89, 90, sec. 1. This reservation was incorporated in the mortgage, and ITS CONSTRUCTION, as applied to the facts of the case, IS THE CONTROLLING QUESTION FOR US TO DECIDE. The power retained by the mortgagor was not an unlimited power to sell. It was a power to sell only in accordance with the terms and conditions of the act of Congress making the grant, which we have said in a former decision, was 'a law as well as a grant.' If these terms and conditions were followed, then the lien of the mortgage was by agreement to be released. If they were not followed as to the mode or time prescribed or otherwise, then the contract of the parties is that the lien of the mortgage is to remain unaffected. Compliance with the essential requirements of the act of Congress became thus a condition precedent to the divestiture of title out of the State as mortgagee. This, we repeat, was the express contract between the parties. It is sufficiently shown in the former opinion in this case that the attempt to sell to Bagley was in direct violation of the terms of the law of Congress, *and therefore necessarily also in violation of the agreement of the parties to the mortgage, which was based on that law. Swann vs. Miller*, 82 *Ala.*, 530. The lien of the mortgage, for this reason, remained undischarged. This we understand to be the natural and just *construction of the mortgage agreement and of the act of the Alabama General Assembly approved February*, 1870, *above cited.* The case of St. Louis Iron Mountain, etc., Railway Company vs. McGee, 115 U. S. 469, is not, in our opinion, in conflict with the conclusion reached in this case. The question there discussed involved the construction of no

mortgage or other contract between the State and the railroad to which the grant was made analagous to the one here construed, which governs the relative rights of the contracting parties."

Again, on page 243 of Record (89 Ala., 637):

"No one could ratify the sale in question except the State, so as to discharge the lien of the mortgage. This could be done only by legislative authority. Vandyke vs. State, 24 Ala., 81. The laws enacted on this subject protect only the titles of *bona fide* purchasers, and Bagley was not of this class. Swann and Billups vs. Miller, 82 Ala., 530, 540. The receipt of the purchase money for the lands by the officers of the railroad company *was no estoppel to preclude the rights of the State.*"

In addition to the Federal question shown by the record, the Supreme Court of Alabama "also decided against the plaintiffs in error on an independent ground, not involving a Federal question, and broad enough to maintain the judgment," and hence the writ of error should be "dismissed without considering the Federal question."

Blount vs. Walker, 134 U. S., 607.

Walter A. Wood Mowing & Reaping Co. vs. Skinner, 139 U. S., 293.

Hopkins vs. McLure, 133 U. S., 380.

Hale vs. Akers, 132 U. S., 554.

Henderson Bridge Co. vs. City of Henderson, 141 U. S., 679.

The Delaware City, Salem & Philadelphia Steamboat Co. vs. Reybold, 142 U. S., 636.

In fact, "the controlling question" decided by the Supreme Court of Alabama was, that, *under a proper construction of the act (of Alabama) of February* 11, 1870, *and the mortgage executed by virtue thereof,* Swann and Billups acquired a title to the lands, superior to any equitable right of Bagley, who is alleged to have purchased from the mortgagor, the Alabama & Chattanooga Railroad Company. This, *"the controlling question" in the case,* was decided adversely to the plaintiffs in error, and it is not a Federal question; so the case cannot be reversed, whether the Federal question involved was decided correctly or not.

Counsel for plaintiffs in error cite, as sustaining the validity of the alleged sales to Bagley, the case of St. Louis, Iron Mountain & Southern Railroad Co. vs. McGee, 115 U. S., 320; Doe ex Dem. Swann & Billups vs. Larmore, 116 U. S., 198. Neither case held that a sale of lands by the railroad company, made before it had complied with the terms of the grant, was valid. The sale to Larmore was made in strict accordance with the terms of the grant. Swann & Billups vs. Larmore, 70 Ala., p. 555.

It was held, in both the McGee case and the Larmore case, that there was not a reversion of the title to the lands to the United States, by reason of the failure to complete the road within the time prescribed in the original grant; and that the only effect of the renewal was to extend the time within which the railroad company might complete the road and acquire title to the lands granted. This was a Federal question. The Court, it seems, went further in the McGee case, and held that the title to the railroad company, acquired by the completion of the road, inured to the benefit of a purchaser from the Company, whose purchase was made when

the company was not authorized under the terms of the grant to make the sale. This, however, was not a Federal question, the decision of which, by the State Court, the Supreme Court of the United States was authorized to review. Whether an after acquired title to lands inures to the benefit of a purchaser from the person thus acquiring the title, depends upon the proper construction of the *laws of the State*, and not upon any construction of the act of Congress granting the lands to the original vendor. In this case the Supreme Court of Alabama held that a sale of lands by the Alabama & Chattanooga Railroad Company, before that company had complied with the terms of the acts of Congress granting the lands, *was void*. This was the only Federal question involved, and its decision by the Supreme Court of Alabama is in perfect accord with all the decisions of this Court upon the same question. The railroad company afterwards acquired the title to these lands, but whether an after acquired title inures to the benefit of a prior purchaser under an invalid sale, is not a Federal question, and the rule in Alabama has long been established that such after acquired title does not pass to one holding under a purchase which was unauthorized and invalid at the time it was made.

Swann & Billups vs. Miller, 82 Ala., 530.
Petit vs Petit, 32 Ala., 288, and authorities cited.

This is not only a rule of property in Alabama, established by the decisions of the Supreme Court of the State, but it is *the final adjudication of the law of this case*, involving no Federal question, and over which this Court has no jurisdiction.

However, if the doctrine in the McGee case is to be

applied to this case, the judgment of the Supreme Court of Alabama must be affirmed. That case, instead of being against us, is really in our favor, although not in accord with the opinion of the State Court.

In the McGee case the grantee, railroad company, had *conveyed* the lands to McGee. In the case now under consideration no conveyance was ever made and no contract to convey was ever entered into by the Alabama & Chattanooga Railroad Company, nor by any *authorized* agent of the company. No deed ever passed between the railroad company and Bagley, the alleged purchaser. The only papers that were given were what they call "entry taker's certificates" (Record, pp. 79, 80, 81), signed by one D. J. Duffy. The Supreme Court of Alabama decided that Duffy had no authority to make sales of these lands. Therefore, the subsequently accruing title of the railroad company could not inure to the benefit of Bagley, because he had not purchased FROM THE COMPANY.

Besides, at the time Bagley received these "entry taker's certificates" from Duffy (which is the only written evidence of the alleged sales) the lands had been mortgaged by the railroad company to the State of Alabama.

Under the laws of Alabama a mortgagee is a purchaser.

Rogers vs Adams, 66 Ala., 600.
Wheelan vs. McCreary, 64 Ala., 319.
Coleman vs. Smith, 55 Ala., 368.
Bartlett vs. Varner, 56 Ala., 580.

Therefore, prior to the time it is claimed that Bagley secured any interest in these lands the title to them had, under the authority of the McGee case, *inured to the benefit of the*

State of Alabama as mortgagee, and could not at the same time inure to the benefit of some one else.

In the McGee case "no title (was) set up under any lien in favor of the State superior to that of McGee." In this case title is set up under a foreclosure of the mortgage in favor of the State, which is superior to any right of plaintiffs in error. It is superior because the title of the Alabama & Chattanooga Railroad Company had inured to the benefit of the State, as mortgagee: and the alleged sales were not by the mortgagor (Duffy having no authority to make them); nor were they made in the manner authorized by the terms of said act of the Legislature of Alabama and the mortgage given by virtue thereof.

THE FEDERAL QUESTION.

1. The alleged sales are in contravention of the statute, and are void. Upon this, the *only Federal question* shown by the record, I have adopted, in part, the brief filed on behalf of defendants in error in the Supreme Court of Alabama by Judge Samuel Rice, viz:

"Section 4 of the original grant to the State of Alabama by said act of Congress of June 3, 1856, (11 U. S. Statutes at Large, pages 17 and 18,) is an affirmative statute, and *imperatively prescribes the only manner* in which said granted lands could be disposed of *prior to the completion of the railroad*, and forbids the disposition of them in any other manner.—Smith's Com. on Const. and Statute Construction, sections 666, 667. Said section 4 is in the following words:

"*And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State *only in manner following*, that is to say: That a quantity of land, not ex-

ceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any 20 continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be *sold*; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall *revert to the United States.*"

"The said act of Congress of June 3, 1856, gave 'a new power,' to-wit, the power of disposing of the lands granted by that act, and in its 4th section prescribed the manner and means of executing it. "Those who claim the power can execute it in no other way." Smith's Com. on Const. and Statute Construction, section 666, and cases cited in a note (a) thereto. "No departure from the manner in which a sale is directed to be made, either a judgment at law or a decree in equity, (or in a statute) is permitted."—Williamson v. Berry, 8 Howard, 544.

"The act of Congress of April 10, 1869, renewed said original grant with certain added conditions, but did not impair or affect said section 4 above quoted, or the manner of disposing of the lands prescribed in that section. This renewal of the grant is found in 16 U. S. Statutes at Large, pages 45-46.

"The said act of our State Legislature of February 11, 1870 (Pamphlet Acts of Alabama of 1869-70, pages 89-92), and the said mortgage to the State thereunder executed by the

Alabama & Chattanooga Railroad Company alike embrace said granted lands, but contain the reservation, that the mortgaging company shall have "the privilege and right of selling said lands, or any part thereof, IN ACCORDANCE WITH THE ACT OF CONGRESS GRANTING THE SAME; provided, however, that *the proceeds of said sales* shall be *appropriated to the payment of*" the indebtedness of the mortgaging company to the State, secured by the mortgage.

"Long before the passage of any of said acts of Congress, it had been settled by the Supreme Court of the United States (see Williamson v. Berry, 8 Howard, 544), that "*sale* is a word of precise legal import, both at law and in equity,'' and that "it means at all times, a contract between parties, to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."—See also, 1 Benjamin on Sales, notes by Corbin, pages 1 and 2.

"In Williamson v. Berry, above cited, one of the main questions was, what was the meaning of the word "sale," when used in the statute. The question was decided by furnishing the definition of the word herein above quoted.

"Congress, in prescribing the manner of disposing of the lands granted by its said act of June 3, 1856, used the word "*sold*," and repeated the use of that word. It used no other word, in reference to the power given to dispose of the lands. And beyond doubt, that word "*sold*" thus used and repeated in said 4th section of the grant, was in used its fixed legal sense and meaning, as authoritatively settled in Williamson v. Berry, above cited; Edwards v. Farmers Fire Ins. Co., 21 Wendell, 492-497; Ives v. Davenport, 3 Hill (N. Y.) R 376-378. And, of course, our Legislature when allowing the mortgaging company the reservation of "the privilege or right of

selling said lands, or any part thereof, *in accordance with the act of Congress granting the same,*" cannot be held to have authorized any sale or disposition which the State itself at the time of such sale or disposition was prohibited from making by said 4th section of the original grant of Congress. For, certainly neither the Legislature of Alabama nor its Governor could repeal or impair said 4th section of the act of Congress of June, 1856, which was part and parcel of the "supreme law" of the land and would override any State law.

"The so-called sales to Joab Bagley, from which appellee seeks to derive his right to relief, were made, *long before the completion of the railroad*; one of them bearing date September 13, 1870, the other bearing date January 24, 1871. It is not averred or pretended by appellee, or proved, that the lands embraced by the so-called sales to Bagley constituted any part of the one hundred and twenty sections which the State was authorized to sell in advance of the completion of construction of the road. The burthen of *averring and proving every fact essential to the validity of the so-called sales to Bagley*, was upon the complainant (who is now the appellee.) Those so-called sales could not possibly be otherwise than void, without avarring and proving that they embraced lands which were part of said first one hundred and twenty sections, or that they were made in compliance with the requisitions of said section 4, of the original grant. No compliance with the requisitions of that section is averred by complainant, or proved; nor is there averment or proof, that any of the lands alleged to have been sold to Bagley was part of said first one hundred and twenty sections. And in the language of the U. S. Supreme Court, "the acts of Congress made it *a condition precedent* to the conveyance

by the State of *any other lands*, that the road should be constructed in sections of not less than twenty consecutive miles. No conveyance in violation of the terms of these acts, *the road not having been constructed* could pass any title to the company," or to any other person.

Schulenberg v. Harriman, 21 Wallace, 59.

Farnsworth v. Minn. & Pac. R. R. Co., 92 U. S. R. 65.

"In Swann and Billups v. Lindsey, 70 Ala. R. 521, this Court said: "Beyond the first hundred and twenty sections, as we have said, the State itself had no authority to sell the lands, except in sections of twenty miles, as the work progressed. It could not part with the limited title it held, even to the railroad, beyond the first twenty miles."

"By said 4th section of the act of Congress, *the right reservation to the United States*, was carefully preserved to every parcel of said land not *sold* in the manner prescribed by that section. Obviously, the so-called sales by Duffy to Bagley were made in contravention of the manner of sale prescribed in that section. Such sales are not "*in accordance with the act of Congress granting*" said lands, and are, therefore, *not authorized by the said act of our Legislature* of February 11, 1870. To hold such sales valid, would be to deprive the United States of *its right of reversion* as to the lands embraced by those sales, although such sales are in violation of the last mentioned act of Congress and of our State Legislature. That *right of reversion* cannot be impaired or embarrassed by anything not authorized by the act of Congress.

"Construing the pleadings of the complainant most

strongly against him, as the Court is bound by law to do, his bill fails even to allege the existence of all the facts which are essential to give any validity to either of the so-called sales to said Bagley. And upon *the facts* alleged and proved, the State itself could not have made either of the alleged sales to Bagley *on the days they were made*—the road not being *then constructed or completed.* And as the State itself had no authority to have made these sales, on the days when they are alleged to have been made, it is certain, that it could not have authorized Duffy or the railroad company to have made them."

The opinion of the Supreme Court of Alabama upon first appeal (82 Ala., 530), having been omitted from the record in in this case, is appended hereto for the convenience of the Court.

After the said decision of the Alabama Supreme Court (82 Ala., 530 and appendix) remanding the case to the Chancery Court, the bill was amended, but, as amended, fails to meet the objections shown by the opinion of the Supreme Court of Alabama. The amendment, by general averment, alleges, the conclusion of the pleader, that the "said contracts of sale were made according to the true intent and spirit of said statute." This allegation is not sufficient to show that the sale was valid. It was necessary to aver and prove that the lands were embraced in the first one hundred and twenty sections of lands authorized under the acts of Congress to be sold, or that the Governor of the State had certified to the Secretary of the Interior that twenty continuous miles of the road had been completed, and that the lands in suit were embraced in the next one hundred and twenty sections authorized by said acts to be sold. Instead of averring and

proving these facts, necessary to sustain the validity of any sale the railroad company or the State could have made, the agreement of counsel shows that the *first* one hundred and twenty sections of land which the Wills Valley Railroad Company was authorized to sell was next the line of the State of Georgia, and that the first one hundred and twenty sections of land which the Northeastern & Southwestern Railroad Company was authorized to sell was next the line of the State of Mississippi. The agreement shown on pages 8 and 9 of Record is as follows:

"In the Chancery Court of Jefferson county, Alabama.

"D. B. Miller
vs.
John Swann and John A. Billups et al.

"It is further admitted and agreed by the solicitors of the respective parties in said cause as follows, to-wit:

"1. That D. J. Duffy, under and by virtue of the same authority by which the lands in this suit were sold to Joab Bagley, did, on the 7th day of September, 1870, make three (3) sales to different parties of the lands included in the grant of Congress mentioned in the bill on the line of said A. & C. R. R. and at a point more than thirty miles from Elyton, Ala., and in a northeasterly direction therefrom and in the direction of Chattanooga, Tenn.

"2. That the following certificates, being certified copies from the Secretary of the Interior, are the only certificates ever filed in the office of the Secretary of the Interior by any Governor of Alabama as to the completion of any part or parts of either the Alabama & Chattanooga Railroad, the Wills Valley Railroad, or the Northeast & Southwest Alabama Railroad, viz:

(4–207*a*.)

"DEPARTMENT OF THE INTERIOR,

"General Land Office,

"WASHINGTON, D. C., October 11, 1888.

"I, T. J. Anderson, acting Commissioner of the General Land Office, do hereby certify that the annexed copies, being two certificates of the Governor of Alabama—first, the completed section of twenty continuous miles of the Northeast & Southwestern Railroad, made January 30, 1866; second, the completed section of twenty continuous miles of the Wills Valley Railroad, made February 12, 1866—are true and literal exemplifications of the original certificates now on file in this office.

"In testimony whereof I have hereunto subscribed my name and caused the seal of the office to be affixed, at the city of Washington, on the day and year above written.

(Signed) T. J. ANDERSON,

[Seal.] Acting Commissioner of General Land Office.

"Hon. James Harlan, Secretary of the Interior,

"Washington, D. C.:

"SIR: Pursuant to the 4th section of an act of Congress entitled 'An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, approved June 3d, 1856,' I hereby certify that more than twenty continuous miles of Northeast & Southwestern railroad are completed. That part of the road which is completed commences at Meridian, Miss., and extends northeasterly in the direction of Gadsden, in Cherokee county, Ala.

"In section 6 of the act above recited the said road is mentioned as one entitled to alternate sections of public lands.

"In witness whereof I have hereunto set my hand and caused to be affixed the great seal of the State this the 30th day of January, A. D. 1866, and the Independence of the United States of America the ninetieth year.

[Seal.] "R. M. PATTON,
"Governor of Alabama.

"By the Governor:
"ALBERT ELMORE,
"Secretary of State.

"Hon. James Harlan, Secretary of the Interior,
"Washington, D. C.:

"SIR: Pursuant to the 4th section of an act of Congress entitled 'An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State, approved June 3d, 1856,' I hereby certify that twenty continuous miles of the Wills Valley Railroad are completed. That part of the road which is completed commences at Chattanooga, Tenn., and extends southwestwardly in the direction of Gadsden, in Cherokee county, Alabama.

"In section 6 of the act above recited the said road is mentioned as one entitled to alternate sections of public lands.

"In witness whereof I have hereunto set my hand and caused to be affixed the great seal of the State this the 12th day of February, A. D. 1866, and the Independence of the United States of America the ninetieth year.

"R. M. PATTON,
"Governor of Alabama.

"By the Governor:
"ALBERT ELMORE,
"Secretary of State.

"3. That the Alabama & Chattanooga Railroad was completed and had cars running on its road from Chattanooga, Tenn., up to Elyton, Ala., on the 13th of September, 1870, the said road from Elyton, Ala., to the Mississippi State —— being unfinished.

"WATTS & SON and JOHN PHELAN,
"Sol's for Complainants.
"SAMUEL F. RICE and SMITH & LOWE,
"Sol's for Swann and Billups, Trustees,
"and all def'ts represented by them.

"On the foregoing is endorsed: 'Filed 14th July, 1888.'
"THOMAS COBBS, Chancellor."

It is neither alleged nor proved that the lands in controversy are located within twenty miles of that portion of either of said railroads, the completion of which had been certified by the Governor to the Secretary of the Interior. So prior to that time, and prior to the completion of said railroad, and the so-called sales are shown to have been prior to both events, (see whole of agreement of cousel on pages 8 and 9 of Record and above quoted), there was no authority given by the statute, either to the railroad company or to the State, to make the alleged sales. The only evidence of the fact of the completion of any portion of said railroad, so as to authorize further sales, "*is the official certificate of the Governor of the State to the Secretary of the Interior.*"

Swann and Billups vs. Miller, 82 Ala., 530.
U. S. vs. California & Oregon Land Co., 148 U. S., 31.

The lands in dispute are in the conflicting six-mile limits

of the grants to the Alabama & Chattanooga Railroad and the South & North Alabama Railroad.

See deposition of F. Y. Anderson, Record, p. 157.

It is not pretended that the South & North Alabama Railroad had in fact earned its undivided moiety of these lands at the time of the alleged sales. If the South & North Alabama Railroad Company had not completed its road according to the terms of the grant, then *its* undivided moiety of said lands was subject to the right of reversion in the United States.

U. S. vs. Southern Pacific Railroad Co., 146 U. S., 570.

So as to this *undivided moiety* of the lands, the so-called sales to Bagley were beyond question absolutely void.

While, under our view of this case, the allegations of the bill are insufficient to authorize the relief sought, there can certainly be no relief granted, because the *proof* fails to sustain the allegations. In order that I may present the remaining questions involved in the clear and forcible language of the late Judge Rice, as presented by him to the Supreme Court of Alabama, the questions of the alleged SALES BEING UNAUTHORIZED, THE STATUTE OF FRAUDS, RATIFICATION, EQUITABLE ESTOPPEL, and LACHES, will be discussed together under the following general subdivision of the brief.

LOCAL STATE LAW.

The original bill alleges that the Alabama & Chattanooga Railroad Company, by its *duly authorized* agent, D. J. Duffy,

sold the lands in controversy to Joab Bagley. Record, page 41. The proof clearly shows that Duffy *was not the duly authorized* agent of the Alabama & Chattanooga Railroad Company.

"In his answer to first cross interrogatory, Mr. Duffy himself, and as witness for complainant, testifies as follows: ☞ "*All the authority I ever had to make sales of said lands was from J. C. Stanton, the general superintendent of said company, and was verbal.*" Record, p. 88. In answer to the 10th direct interrogatory, (Record, p. 87,) Mr. Duffy testifies, that his authority being questioned in an important suit, and it having become necessary for Duffy to prove the authority of J. C. Stanton, if possible, he (Duffy, in 1878) appealed to Mr. Stanton for a copy of his authority under which he was assuming absolute control of the Alabama & Chattanooga Railroad Company and its property. He gave me a copy of the authority, and I herewith file a copy of the same, marked Exhibit C, and make it a part of my answer." Said Exhibit C bears date more than a year before the passage of said act of February 11, 1870, and the execution of said mortgage to the State, and does not even purport to give J. C. Stanton any authority to sell or convey any of *the said lands* It is found on page 90 of the Record, and is as follows:

"BOSTON, January 26th, 1869.

"At a meeting of the Board of Directors of the Alabama & Chattanoaga Railroad Company, held this day, it was voted that the General Superintendent have entire charge of building and equipping the railroad, the power to buy all materials and make all contracts incident thereto, and that all employees of the company shall be under his charge and subject

to his orders, with power to dismiss whenever he may deem it for the best interest of the road so to do.

(Signed) ALBERT F. THAYER,

{Seal of the Co.} Sect'y."

A true copy. Attest: J. Richards.

(See also agreement of counsel on page 7 of the Record, showing that this was *the only* authority ever given by the Board of Directors to the said J. C. Stanton.)

"The deposition of Duffy shows very clearly, that up to 1878, he had been misled by J. C. Stanton, into the belief, that J. C. Stanton had in fact the boundless authority over the Alabama & Chattanooga Railroad Company and its property, which he assumed; that Duffy was induced by that belief to accept the verbal appointment of land commissioner from J. C. Stanton; and that neither J. C. Stanton nor Duffy ever had any *written authority* from the company or its board of directors, to sell any of the said lands.

"The testimony of Duffy in these respects is not deprived of its force by the testimony of D. N. Stanton and J. C. Stanton; but is strongly corroborated by both of them, and especially by the remarkably evasive answer of J. C. Stanton to the searching cross interrogatory numbered 7. Record, p. 100. That answer craftily says: "My *recollection* as to this is, that I had two written authorities, one given me in the latter part of 1868 or early in 1869 signed by the *President and Secretary;* and later, in 1869, *I got another extending my authority.* I have lost both of them." He testifies, that his *first and smaller* written authority was in the latter part of 1868 or early in 1869, and *was signed by the President and*

Secretary; and that "*later*" than his first authority, and "in 1869," he got another written authority which was *more extensive* that the first; but he does not tell how it was signed. As he does not pretend to have had but "two written authorities," the inference is natural that this later and more *extensive authority* is the identical one of which, in 1878, he gave Duffy a copy, and which is set forth in Exhibit C to Duffy's deposition. The one bears date January 26th, 1869, and is *not signed by the* "*President and Secretary,*" but by the Secretary only, and is doubtless the latest and most extensive written authority the said J. C. Stanton ever had. It confers no power to sell or convey any of the lands here in controversy.

(It devolved on the plaintiff to show that John C. Stanton had written authority extensive enough to give him the right *to sell the lands* of the company. This he *failed to do,* and in so failing, his right to a specific performance of the contract mentioned in the bills, has not been established.)

"J. C. Stanton, in his present deposition, swears that he did not testify in his deposition taken in the case of Doe *ex dem.* Swann and Billups v. Curry and Jackson, "I was not an agent to sell lands," or words to that effect. Record, p. 98-99. He did so testify. See his answer to 6th interrogatory on page 229 of the Record. D. N. Stanton contradicts J. C. Stanton. For example, D. N. Stanton, (who was the President of the company from 1868 up to October, 1871, when Drake was elected his successer, as testified by J. C. Stanton in his answer to 4th cross interrogatory,) testifies in his answer to the 2d interrogatory, Record, p. 92, "*I don't know Daniel J. Duffy.* I have *since I resigned been informed* that he held the position of land agent, but I don't know of my personal knowledge." A critical reading of the artful testimony of

the Stantons, and the artful arrangement of having a "*local treasurer*" at Chattanooga near the land commissioner, induces the belief that Duffy's so-called sales of lands were in no just sense other than sales of J. C. Stanton's appointee, and not binding on the company, or on the State of Alabama, or its grantees, Swann and Billups.

"Duffy was not authorized by the company to make said so-called sales to Bagley. But if so, he was not authorized in writing to make said so-called sales. And even if his acts could be regarded as binding to any extent as against the mortgaging company, which is denied,—see Tenn. & C. R. R. Co. v. East Ala. Ry Co., 73 Ala. R. 427—they certainly were never binding as against the State as mortgagee or against its grantees or assignees. Even if there was ground for the operation of the doctrine of ratification or estoppel *in pais*, as against the *mortgaging company*, there is no ground for the operation of either of these doctrines, as against the State or its assignees. It is settled law as well as natural equity, that the rights of the mortgagee or his assignees, cannot be prejudicially affected by the dealings of the mortgagor with third persons, without the knowledge or participation of the mortgagee or his assignees. Bronson v. La Crosse R. R. Co., 2 Wallace, 305.

"In Standifer *et al* v. Swann and Billups, 78 Ala. R., 88, this Court held, that if a conveyance of lands is made "by an agent, he is required by statute to have *a written authority*." Code, § 2145. So every contract for the sale of lands which is required by our Statute of Frauds, to be in writing, if executed by an agent must be under *written authority*. Code of 1876, § 2121. It is manifest that no body corporate can appoint an agent to convey lands (or to make a contract for the sale of lands situated in Alabama), "except by the vote of

its directors, or other managing board in whom the power to sell may be reposed by charter or by general law. Angell & Ames on Corp., 11th Ed., § 232; Wood's Field on Corp., §220; Tenn. & C. R. R. Co. v. East Ala. Ry Co. 73 Ala. 426; Code, § 2121. The defendants (Standifer *et al.*) have failed to produce any corporate proceedings or minutes showing the appointment of Stanton as agent of the railroad company with authority to *sell and convey lands.* This was the best and only legal evidence of such authority; and in the absence of it, the deed from Stanton would be no evidence of title. 78 Ala. R. 88.

"The decision of this Court in Standifer v. Swann and Billups, *supra*, taken in connection with the principles declared in the 7th and 8th head notes of Tenn. & C. R. R. Co. v. East Ala. Ry Co.; 73 Ala. R. 427, destroys the alleged right of appellee to any relief in this case. It cannot be tolerated that the policy of our Statute of Frauds and the soundest principles may be practically overthrown, by allowing *the want of written authority* in an agent or corporation to sell lands, to be supplied by such unsatisfactory evidence as is here shown as to the knowledge of *some* of the acts of the alleged agent, Duffy, by *some of the directors.*

"The only thing which can possibly supply such want of written authority, is proof not merely of payment of part of the purchase money, but in addition thereto, that the purchaser was "*put in possession of the land by the seller.*" Code of 1876, § 2121. Although the bill alleges that Bagley went into possession after his so-called purchase, yet there is neither allegation or proof that Bagley was "put in possession of the lands by *the seller.*" The contrary is proved substantially by Duffy's deposition. And it is not proved that Bagley ever had possession. The answer denies that he ever had possession.

"Bearing in mind that Duffy could not bind the railroad company by a contract for the sale of land, because he had *no authority in writing* to make such contract, attention is now invited to the two written contracts *signed and sealed by him* which complainant has made *the foundation* of his legal right, and also parts of his bill, and has marked respectively Exhibit A and Exhibit B. Record, pp. 50-51. According to the definition of a deed found in the Law Dictionaries, each of said written contracts is a deed. In Carter v. Doe *ex dem.* Caudron, 21 Ala. R. 88, this Court, after careful examination of the authorities, said: "It is very clear, we think, that to constitute it the deed of the principal, he, and not the agent, must appear, from *the body* of the deed, to be the grantor; and the deed must be signed with his name, *and purport to be sealed with his seal.*" The same principle applies more strongly, where the question is, whether the deed is the deed of *a corporation.* "To bind the corporation, the deed must be under the seal of the corporation, and not under the seal of an attorney."

Story on Agency, 8 ed. §§ 149, 150, and notes thereto.

"Each of said written contracts, shown in said exhibits to the bill, begins thus: "This is to certify that *I, Daniel J. Duffy,* Commissioner for the sale of Alabama & Chattanooga Railroad Company, successor to the Wills Valley Railroad Company, for the sale of lands granted to said company by act of Congress, approved June 3, 1856, and subsequent act of Congress to the Alabama & Chattanooga Railroad Company, reviving said act of June 3, 1856, approved April 10th, 1869, *have this day sold to Joab Bagley;* &c., &c. After describing the land and terms of sale, each of the written con-

tracts contains this provision: "This is, therefore, to entitle the said Joab Bagley to receive a deed for the above described tract of land, from the said railroad company, by its President, Secretary, or other duly authorized agent, when the full amount of the purchase money with interest is paid." And near the close of each of said written contracts, the following words are found: "Witness *my* hand and *seal* the day and date last above written."

"Each of said written contracts, if valid at all, was binding upon Duffy personally, as he had no sufficient authority to bind the railroad company thereby. And each of said written contracts, if valid at all, was virtually a contract by him personally, conditioned that a third person (to-wit, the corporation) should convey the lands to Bagley when the purchase money and interest was paid.

Whiteside v. Jennings, 19 Ala. R. 784.
Pinkston v. Huie, 9 Ala. R. 252.

"Inasmuch as each of said written contracts, if not void, was personally binding upon Duffy when it was made, and was not at that time binding upon the mortgaging railroad company, or upon the State as mortgagee, there is nothing in our law which can justify our courts in holding, that upon the pleadings and evidence in this cause, the State, as well as its subsequent assignees, became afterwards bound by either of said written contracts; especially in the absence of any allegation or proof, that the State, or its assignees received any benefit from *these particular written contracts*, or ever had any notice of their existence prior to the assignment or conveyance of the State to Swann and Billups, on February, 8th, 1877.

"From the record it appears that, it would be unjust to hold the State bound by these two written contracts. *They*

do not show the truth as to the actual dealings between Duffy and Bagley. This is proved by Duffy's deposition, as well as by allegations contained in the bill of complaint. On pages 41 and 42 of the Record, it appears that complainant in his bill alleges that on the 13th day of September, 1870, the Alabama & Chattanooga Railroad Company, through its duly authorized agent, executed and delivered to the said Joab Bagley, a contract in writing, of which Exhibit A, thereto attached, is a copy, and made part of this bill. At the time of the execution of said last named instrument, *and inserted therein*, the said Alabama & Chattanooga Railroad Company *reserved to itself the minerals in and upon said lands.* But afterwards, viz: on the 24th of January, 1871, the said Bagley, for a consideration, *then paid*, bought of said Alabama & Chattanooga Railroad Company the minerals and mineral privileges so reserved, and *then and there the reservation in the body of said contract was erased*, and the said company, through its duly authorized agent, Daniel J. Duffy, inserted in the body of said written contract the following words, viz: "The said Joab Bagley having purchased the right to the minerals and mining privileges upon said lands the same are released by—this, January 24, 1871—the said Alabama & Chattanooga Railroad Company, thereby intending to quit-claim and release to said Bagley all the right which had been, *in the first trade, reserved to said company.*"

"The minerals which were clearly reserved to the company "in the first trade," as actually made and in the written contract, bearing date September 13, 1870, as it was originally signed and delivered by Duffy, were obviously valuable. Duffy, in his answer to the 7th direct interrogatory, shows that Bagley offered for part of the minerals so reserved to the company, fifty cents per acre, for another part seventy-five

cents or a dollar per acre, and one dollar and a half per acre for another part; Duffy, in his same answer, shows that he refused this offer of Bagley, and asked him two dollars and a half additional per acre, one fourth cash, and the balance in notes for equal instalments, payable in one, two and three years with interest from date; but is unable to say what was agreed upon finally. The bill alleges that Bagley paid for these minerals, when the reservation of them to the company was erased. But there is no proof by Duffy or otherwise of any payment by Bagley in cash or notes or otherwise, for these minerals. Clearly, there is something wrong as to these minerals; Bagley has not paid anything for them; and their value is wholly unaccounted for.

"As to the other exhibit, that is, Exhibit B, Duffy, in his answer to the 6th direct interrogatory, testifies, "The date of January 24, 1871, I am satisfied is not the true date of the transaction, *but that has been altered since it left my possession.*" Record, p. 85.

"Written contracts, thus proved to have been altered by erasures and otherwise, and which have been put into such shape as to conceal truth, cannot properly be made the basis of decreeing relief to those who claim under them, and fail to give either in the pleading or evidence, any satisfactory explanation of the suspicions with which the proof loads them.

"The objection to decreeing relief to any person who claims, in substance, specific performance of such questionable written contracts, becomes absolutely insuperable, when *such long and unexcused delay* has occurred between the time when they are alleged to have been made and the time when the bill was filed for their specific performance—*a period of about thirteen and a half years*—from January, 1871, to July, 1884.

This is fully established in Johnson v. Johnson, 5 Ala. 99, approving Smith v. Clay, therein cited.

"Complainant's allegations are, that on January 27, 1871, (only three days after Bagley's alleged purchase) Bagley and wife conveyed to McKee, Fuller & Co., 160 acres of the two hundred acres which Bagley had bought of Duffy; that on October 7th, 1871, Bagley and wife conveyed to McKee, Thomas & Co., the other 40 acres (the s. e. qr. of s. e. qr. of said section 1, T. 18, R. 3, west), which Bagley had bought of Duffy; that on January 10, 1873, the said McKee and others conveyed to the Jefferson Iron Company, a corporation under the laws of Alabama, all the said lands which Bagley had bought of Duffy; that on Nov. 9, 1874, the Jefferson Iron Company by agent conveyed all of said lands to complainant Miller, but that this conveyance was a mortgage, and that on March 10, 1880, the Jefferson Iron Company, by instrument of that date, authorized complainant Miller to sell under said mortgage, and that accordingly, on May 11, 1880, Miller did sell under the mortgage, and became the purchaser of the lands here in controversy, and other lands which were embraced in that mortgage; and that said Joab Bagley died in Jefferson county, Alabama, in 1875.

"The testimony of Mrs. M. J. Kilgore, Henry Morrow, George B. Randolph, and others, shows that each of subdivisions of the land alleged to have been bought of Duffy by Bagley in September, 1870, and January, 1871, was held in possession by persons (to-wit, by Ira O'Bar and said Randolph) who held adversely to Bagley, and to all claiming under him, from 1870 and 1871, until sued in ejectment by Swann and Billups in 1877 or 1878, and turned out of possession in consequence of the proceedings in such suit or suits. *During all that period no possession was held or suit brought by*

Bagley or any of those claiming under him, except only the pretended possession of Phelan, which is shown to have been acquired in such manner, and under such circumstances as to strip him of all claim to active relief by a court of equity.

Turnley v. Hanna, 67 Ala. 101.
Wray v. Taylor, 56 *ib.* 188.

"It was only in July, 1884, and after Swann and Billups had recovered judgment in ejectment against O'Bar and Randolph, and had sued said Phelan in ejectment for the said southeast quarter of the southeast quarter of said section one, township 18, range 3, west, the surface of which complainant and his wife are alleged to have conveyed by quit-claim only to said Phelan in July, 1883, that any person claiming under Bagley ventured to bring any kind of suit; and it was not until July, 1884, that Miller ventured to bring the present suit; although his own bill alleges, that the property here in controversy was conveyed to him as mortgagee, by the Jefferson Iron Company as long ago as November 9, 1874, and, although neither he nor his mortgagors had ever held possession of any land here in controversy. This suit was not brought by Miller, until more than seven years after Swann and Billups had become the grantees and assignees of the State under the Debt Settlement Act of our Legislature of February 23, 1876, for a valuable consideration received at the time by the State, *and without any notice of the alleged claim of Bagley or of any person claiming under Bagley.* Grantees and assignees like Swann and Billups, are regarded by the law as purchasers for value (95 U. S. R. 16, 18), and are entitled to protection as such purchasers, if they become such

bona fide and without notice of such a claim as that of Bagley, or those claiming under him.

1 Story Eq. Jur. 12 Edition, section 1209.
Bump on Fraud, Con. 3d edition, 360.
N. O. Canal and Banking Co. v. Montgomery, 95 U. S. 16.

"Each person claiming under Bagley is charged by law with notice, that Bagley had no conveyance; that he had only such a certificate of purchase from Duffy as is disclosed by the pleadings and evidence; that he had not paid the purchase money agreed on, and did not have the legal title. Hence, no one claiming under Bagley can be treated as a *bona fide* purchaser without notice.

Witter v. Dudley, 42 Ala. 616.
Johnson v. Thweatt, 19 Ala. 741.
Gimon v. Davis, 36 Ala. 589.

"Bagley's alleged claim was in the nature of a bond for title, and was not *recordable* by law. Its registration was not notice. To enforce such claim against the State as mortgagee, or its assignees, Swann and Billups, *one of the essentials is*, that the complainant should show on his part, *in his pleading as well as in his evidence, conscience, good faith and reasonable diligence.* Another essential on complainant's part is, that he should show, in his pleading as well as in his evidence, that he stands upon some equity superior to that of the party against whom he asks relief. If the equities are equal, or if there is a want of conscience, good faith or reasonable diligence, a court of equity is silent and passive.

1 Story' Eq. Jur. 12th ed. section 176 and cases cited in note 3 thereto.

Smith vs. Clay, 3 Brown's C. 639, *note.*

Johnson vs. Johnson, 5 Ala. R. 96–99, and authorities cited on page 102.

"Upon Miller's own showing, in his own bill, his right as mortgagee came into existence by the mortgage of the Jefferson Iron Company to him, on November 9, 1874; and there has been nothing to prevent him from seeking the relief he now seeks, since February 8, 1877, when the State, by its Governor, conveyed or assigned all its rights in the premises to Swann and Billups. The complainant *does not aver or pretend* that he did not have notice of said conveyance or assignment to Swann and Billups at and from the time of its execution and registration. He must be charged with notice of it. And his *laches*—his failure to sue until July, 1884, is enough to prevent a Court of equity from becoming active in giving him relief; *especially* as he waited until Swann and Billups acquired *the legal title*, and until the land became of great value for its minerals and surroundings, they being quite near the new but great city of Birmingham.

Holgate vs. Eaton, 116 U. S. R. 33.

Gilmer vs. Josiah Morris, decided by this Court at its December term, 1885.

Jackson vs. Edwards, 22 Wendell, 508–512.

Doar vs. Gibbs & Matthews, 1 Bailey's Equity Rep. 371.

Colcock vs. Butler, 1 Dessausure's R. 307.

"The complainant cannot entitle himself to a decree by

merely *proving* the existence of the facts which show his right to relief, without also having averred in *his pleading* the existence of all those facts. No decree can be rendered which is not founded on allegation in the bill.

Spoor vs. Phillips, 27 Ala. 196.

"The allegation and proof must correspond, and each must show the complainant's right to the decree in his favor. But, in this case, *the pleading* of the complainant when properly construed, does not aver or show, that the lands alleged to have been sold by Duffy to Bagley were "*mineral lands.*" The bill of complainant goes no further that to allege, that in the first certificate of Duffy to Bagley, there was a *reservation* to the railroad company of "the minerals in and upon said lands" described in that certificate, and that afterwards, to-wit: on January 24, 1871, Bagley, for a valuable consideration then paid, bought of said company "the minerals and mineral privileges SO RESERVED," and that then and there the said reservation "was erased," and in lieu thereof a statement was inserted that Bagley having purchased "THE RIGHT to the minerals and mining privileges upon said lands the same are released." Now, all that is thus cautiously alleged, is merely *evidence* that the lands were mineral lands, and this *evidence* may be true. But to make *the pleading* good, it must aver *the existence* of the necessary facts and not the mere *evidence* of these facts.

Gilisson vs. Herring, 2 Dev. Law R. 160.

"The complainant fails to allege, as matter of fact, that the lands were "mineral lands."

As the bill fails to allege that the lands were "mineral

lands," or that Bagley was an actual settler, the Court, *as against complainant*, must treat the lands as not being "mineral lands," and Bagley as not an actual settler. And, therefore, it is clear, that the sales by Duffy were not in accordance with, but in violation of, *the proviso* to the first section of said act of Congress of April 10, 1869. That proviso is in the following words: "That the lands granted by the act hereby revived, except mineral lands, shall be sold to *actual settlers only*, in quantities not greater than *one quarter section to any one purchaser*, and for a price not exceeding two dollars and fifty cents per acre." The bill alleges that Duffy sold to the same purchaser, Bagley, at least 200 acres.

"They said sales of Duffy to Bagley were not only in violation of said last mentioned act of Congress, but also of said act of the Alabama Legislature of February 11, 1870. By this last mentioned act, two imperative and substantial restrictions were affixed to the privilege or right of the mortgaging company to sell any of the said lands: 1st, that each sale of such lands by the company should be "in accordance with the act of Congress granting the same;" and, 2d, "that *the proceeds* of said sales shall be appropriated to *the payment of the aforesaid first mortgage bonds of the said railroad company, issued to the State.*"

"The general rule is, that if a trust directs that lands should be sold for payment of debts generally, the purchaser is not bound to see that the money be rightly applied. If the trust directs that land should be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts." In section 1127 of 2 Story's Eq. Jur. 12th Edition, the principle is thus illustrated: "Thus, for example, if a trust is created to sell for the

payment of *a portion*, or of A MORTGAGE, then the purchaser must see to the application of the purchase money to *that specified object.*" See the numerous authorities cited in the *notes* to that section, and see also section 1132 of same volume, and note 1 thereto.

1 White & Tudor's Eq. Leading Cases, and marginal page (66.)

"The sales made by Duffy to Bagley are not exempted from the operation of the foregoing principle, by anything contained in section 2197 of the Code. That section is confined to "cases in which a payment has been or may be to *a trustee, authorized to receive the same.*" Horn vs. Horn, 2 Sim. & Stu. 448. 1 White & Tudor's Eq. Leading Cases, marginal page (73.) If Swann and Billups, to whom as trustees, the State conveyed and assigned in February, 1877, should thereafter receive a payment for any of the lands sold by them as trustees, that would be a case within said section 2197 of the Code; for, that would be a payment "to a trustee authorized to receive the same," but Duffy never was "*trustee authorized to receive*" *a payment* for any of said lands sold to Bagley, within the meaning of said section 2197. If the sales of Duffy to Bagley can be held to be embraced by that section, then *every sale* of land by an agent without any written authority, that is, without the only lawful authority for the sale of land, would be equally embraced by that section. An agent to sell land in Alabama who has no written authority, is not, and cannot be "*a trustee authorized to receive*" *a payment* for land sold by him.

"When a payment is made "*to a trustee authorized to receive the same,*" a reason exists for exempting "the person making *such payment*" from responsibility for its application,

which does not exist when a payment for land in Alabama is made to an agent who (like Duffy) has no written authority *or title*, but who nevertheless sold the land. But even if there was a good reason for the one as for the other, the Court is bound to hold, that a payment "made to *a trustee authorized* to receive the same," is "*the specific case*" provided for by said section 2197 of the Code; for, "the Court is not called on to say what law the Legislature should have made, but simply what law *it did make for such a case as the present*."

Martin vs. McRee, 30 Ala. R. 116—118.

"It is clear from the evidence, that, as to the lands sold by Duffy to Bagley, and as to the small portion of the price received by Duffy from Bagley, Duffy was not *the trustee or agent of the mortgagee* (*the State of Alabama*), and had no valid authority from the State, or even from the mortgaging company. The acts of Duffy could not, therefore, deprive the State of its legal priority as the first mortgage of the land here in controversy; or of its right to convey to Swann and Billups all the rights and priorities it had as the first mortgagee.

"Phelan does not appear as a complainant, but is made a defendant. He files no answer. In his own name he asks no relief; but the complainant, Miller, asks relief for him, and takes and introduces his deposition. Of all the persons claiming title of any kind under Bagley's so-called purchases, Phelan is the only one who appears to have had even the semblance of possession. The attempt to prove by Ephraim Murphy (colored), that the possession he had in 1875 and 1876, of "about four acres," was the possession of the Jefferson Iron Company, fails utterly; because he swears his possession was by permission of James Thomas, superintendent of

the Jefferson Iron Company; and because there is no evidence that said James Thomas ever had any authority of said company to permit Murphy, or any other person to clear or cultivate any land claimed by it. And that possession of Murphy was abandoned before February, 1877, when Swann and Billups became the assignees of the State.

"From the whole evidence, it is apparent, that Bagley himself never had any possession of any of the lands embraced by his so-called purchases, and that none of the persons claiming title mediately or immediately, under him, ever had any possession until *after the complainant Miller*, "about the 1st of July, 1883," had been visited by Phelan to "negotiate for the purchase of the said forty acres," (the southeast quarter of the southeast quarter of section 1, township 18 S., range 3 west), and "had agreed to sell" Phelan "the surface interest for three hundred dollars, reserving to himself (Miller) the mineral interests," as is more fully shown in Phelan's answer to the fifth direct interrogatory.

"Phelan's own deposition proves, that complainant did not make or deliver to him any conveyance of any interest in said forty acres before July 16, 1883, but that Phelan, on a preceeding day of the same July, having obtained from complainant *said agreement to sell* Phelan said surface interest, "*thereupon*" *went* "to the land and found that the house mentioned above was unoccupied, *and both the doors were locked*," and that he gained an entrance in *a peculiar* way, described by himself; and that in this *peculiar way* described by him he had got himself into the "actual possession of the said house, and of the said forty acre tract, *before* he had obtained *any lawful conveyance or evidence of title* to said forty acre tract. Upon Phelan's own deposition, his conduct in entering said house and said forty acre tract was wrongful; the possession

thus obtained by him would not support an action for forcible entry, against the tenant who had locked up the house.—Wray vs. Taylor, 56 Ala. 188—nor be protected by a Court of Equity.—Turnley vs. Hanna, 67 Ala. 101.

"The following facts are significant: that Miller could not be induced to execute to Phelan any other than a mere quit claim conveyance to "the surface interest," that Phelan would not part with the agreed price nor accept the conveyance until after he had managed, as shown in his deposition to get what he calls actual possession of the said house and forty acres, that soon after Phelan had thus obtained possession he was sued in ejectment, for said forty acres by Swann and Billups and the State, and that Miller (a mere quit claim vendor of Phelan) seeks in the present suit, to obtain the injunction of the ejectment suit against Phelan; although it is clear, that a judgment for the plaintiffs in the said ejectment suit cannot prejudice Miller as to the "mineral interests" he reserved, or in any other respect. For if Miller really has a good right to said "mineral interests," that right will not be impaired or affected by the recovery in ejectment against Phelan.

"But the conduct of Phelan becomes far more indefensible when it is considered in the light of his own testimony, taken in connection with the testimony of Anderson, White, Randolph and other witnesses, supported by the writing attached to their depositions, (including Phelan's own writings.)

"Phelan's own testimony shows that "in the early part of January, 1871," he made application to Duffy, at Chattanooga, to purchase the said southeast quarter of the southeast quarter of section 1, township 18 south, range 3 west, and was informed by Duffy that Bagley had purchased it; that he,

Phelan, was practicing law at Elyton, and heard of the alleged purchases from Bagley by McKee, Fuller & Co., and by McKee, Thomas & Co. in 1871, and of the subsequent alleged purchase by the Jefferson Iron Company. In his answer to the third cross interrogatory, he admits that ever since 1878 he has "been anxious to purchase this land," the said forty acres last above described; but he positively denies, that in the summer of 1881, and before he took possession of said last mentioned forty acres, he informed said Randolph that this said forty acre tract of land was railroad land, and that the trustees, Swann and Billups, could make him a good title. Phelan testifies, "I made no such statement, nor gave him such information." In answer to the specific question, duly propounded in third cross interrogatory, Phelan further testifies, "I did not apply to the agent of the aforesaid trustees to purchase said tract of land, to-wit: the southeast quarter of the southeast quarter of section 1, township 18, range 3, west; nor did I sign an application in which I offered to purchase said land from said trustees." His answers as to the first of these material matters are positively contradicted by Randolph, and as to the second (that is, the application), by Anderson, White and Randolph, and by the production of Phelan's own application to the agent of said trustees, signed with Phelan's own hand, on June 30, 1871, to purchase said forty acres last above described at $25.00 per acre.

"And this application of Phelan to purchase at $25.00 per acre, was followed on July 9, 1881, by Randolph's application to purchase the same forty acres at $27.50 per acre. See deposition of Anderson.

"This forty acre tract appears to be quite near to or adjoining the city of Birmingham, and within less than six miles of the South and North Alabama railroad, and the old

Alabama and Chattanooga Railroad (now known as the Alabama Great Southern Railroad). This tract of land has been steadily increasing in value since 1881; and yet, the proposition upon which complainant Miller and defendant Phelan seem to have agreed, is, that for $300 paid by Phelan to Miller for "the surface interest," the Court of Equity is to be made active in destroying the rights of Swann and Billups from prosecuting the ejectment suit against Phelan and in relieving Miller by decreeing specific performance as to all the lands alleged to have been bought by Bagley from Duffy, on or before January 24, 1871, although said lands are shown to be worth more than ten times the price which Bagley is alleged to have agreed to pay for them.

Blackwilder vs. Loveless, 21 Ala. 371.

"The trustees, Swann and Billups, are, like mortgagees, purchasers for value; and occupy the same ground with respect to notice of any outstanding equities. Their intervening rights, acquired by the conveyance of the State to them on February 8, 1877, without notice of the alleged purchases of Bagley, cannot be held inferior to the alleged rights of those who claim title under Bagley's alleged purchases.

New Orleans, *etc.* Co. vs. Montgomery, 95 U. S. R. 16, 18.

"The complainant, Miller, fails to show, in his allegation, as well as in the evidence, in support of his claim, "conscience, good faith, and reasonable diligence." In the absence of these, the Court of Equity is passive and does nothing for him, and cannot become active in giving him relief. Laches and neglect are always discountenanced. Attempts by

complainants asking for specific performance, to take advantage of "a change of circumstances" and of a great advance in the price of the property involved in the attempt, are entitled to no favor—and especially against the intervening rights of such trustees as Swann and Billups.

Sullivan & Portland, etc. R. R. Co., 94 U. S. R. 811, 812.

Haywood vs. National Bank, 96 U. S. R. 611 617, 618, 1 Story's Eq. Jur. 12 Edition, sections 771, 776, and notes thereto.

Lyon vs. Goodwyn, 4 Porter, 297.

"For the sake of argument merely, the case has been treated as if the complainant, Miller, had duly proved the execution of the several conveyances alleged in his bill and under and through which he claims relief. But the originals of said several conveyances were neither proved or produced in the Court below, nor was any predicate laid for allowing a duly certified transcript in lieu of said originals, under section 2154 of our Code.

"It is well settled, that equity will not enforce performance of a contract against one of the parties, unless it can also enforce performance against the other party. Bagley died in 1875, before the State had ceased to be owner as mortgagee and before Swann and Billups acquired any interest whatever in or to the lands in controversy. Bagley's estate was long ago and before the commencement of this suit, declared insolvent. Miller, the complainant, has never *before the filing of his bill*, sustained any such relation to Swann and Billups as would enable them to enforce performance against him. And after the great advance in the price of the lands, a

Court of Equity will not aid Miller in his effort to *create by his own bill*, a right on his own part to claim specific performance, which did not exist *before the filing of his bill.*"

Counsel for plaintiff in error cite the deposition of Albert F. Thayer as showing that Daniel J. Duffy was regularly appointed the agent of the Alabama and Chattanooga Railroad Company, with power to sell the lands of the company. In his answer to the 4th interrogatory on page 27 of the Record, Thayer stated, "I do not remember that the Board of Directors ever took action concerning Mr. Duffy. I do not remember that the Board of Directors ever specially authorized Mr. J. C. Stanton to sign deeds. The power given him was *general and not specific*, and the Board doubtless did not consider it necessary to specify what he should and should not do. * * * * I do not remember the wording of the vote *or any thing about it*, except the vivid impression that it was sweeping and extraordinary in its provisions." This witness qualifies all his statements by adding the words "as I believe." He may believe the facts related to be true, and yet the evidence upon which he relied might be insufficient to create a similar belief in the mind of the Court.

Because the Bagley notes, with others, were turned over to Fred Wolffe, the assignee in bankruptcy, does not affect the question of the validity or invalidity of the sales of the lands. The debt settlement act only required Swann and Billups to collect unpaid notes given for *valid and legal sales* made by the Alabama and Chattanooga Railroad Company—not notes for unauthorized sales, made by Duffy. While the

Record is silent as to whether Swann and Billups ever collected these notes, the truth is they never did, and never even attempted to do so, but from the beginning of the trust, they refused to recognize the sales as valid.

Respectfully submitted,

J. A. W. SMITH,

Attorney for Defendants in Error.

APPENDIX.

SWANN AND BILLUPS VS. MILLER.

Bill in Equity by Purchaser of Railroad Lands, to Obtain Title from Trustees.

Appeal from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 15th July, 1884, by D. B. Miller, against John Swann and John A. Billups, trustees in a conveyance executed to them in the name of the State of Alabama, and against several other persons as tenants in possession under them; and sought to divest the legal title to a tract of land out of said trustees, and to enjoin an action at law which they had instituted against Ellis Phelan, to whom the complainant had sold and conveyed, reserving all minerals and mineral rights to himself. The tract of land contained 200 acres, and was part of the public lands granted to State of Alabama by the act of Congress approved June 3d, 1856, in aid of certain railroads therein described, two of which were afterwards consolidated and incorporated under the name of the Alabama & Chattanooga Railroad Company; and which were set aside to said last named railroad company, under the terms of said grant. The complainant derived title, through several mesne conveyances, from one Joab Bagley, to whom the lands were sold,—one part on the 13th September, 1870, and the other on the 24th January, 1871,—by one D.

J. Duffy, acting as the agent of the said railroad company; part of the money being paid in cash, according to the terms of the contract, and the purchaser's notes given for the residue. At the time each of these contracts was made, Duffy signed a written instrument, under his hand and seal, which stated that he had made the sale as "commissioner for the Alabama & Chattanooga Railroad Company, for the sale of lands granted said company by act of Congress," etc.; and, after stating the terms of sale, declared, "This is, therefore, to entitle the said Joab Bagley to receive a deed from the said railroad company, by its president, secretary or other duly authorized agent, for the above described tract of land, when the full amount of the purchase-money, with interest, is paid." The money paid by Bagley was paid over to the proper officers of the railroad company, and the purchaser's notes were delivered to them; and on the subsequent bankruptcy of that corporation, the State of Alabama became the purchaser of all its lands, property and rights, on which the State held a mortgage, given under the provisions of the act of the General Assembly approved February 11, 1870, to protect its indorsement of the bonds of said company.

The conveyance to said Swann and Billups as trustees, under which they claimed the lands, was dated February 8, 1877, and executed under the provisions of the Debt Settlement Act of February 23, 1876; and it conveyed to them, for the purpose therein mentioned, all the lands and other property which the State had acquired from the said railroad company. Bagley died in 1875, and the bill alleged, on information and belief, that he had paid, before his death, all of the agreed purchase-money for the land; and the complainant offered to pay any balance that might be found due.

The several acts of the General Assembly of Alabama

incorporating the different railroad companies, and lending the State's credit in aid of the Alabama & Chattanooga road by indorsing the bonds of the company; the act of Congress granting the lands, and the subsequent act renewing and reviving the grant; the joint resolutions of 1857-8, transferring the lands to the railroad company, and other legislative acts relating to the railroads, were in evidence; but, as they are matters of public history, and their material provisions are quoted in the opinion of the Court and the briefs of counsel, it is only necessary to refer to them here. They may be found published in the following volumes: U. S. Statutes at Large, vol. 11, p. 17; 16 *Ib.* 45; Sess. Acts of Ala. 1851–2, pp. 178–83; Sess. Acts 1853-4, pp. 270–80; Sess. Acts 1857–8, p. 430; Sess. Acts 1868, pp. 209–11, 345–78; Sess. Acts 1869–70, pp. 89–92; Sess. Acts 1875–6, pp. 330–46.

The Chancellor overruled a motion to dismiss the bill for want of equity, and on final hearing on pleadings and proof, rendered a decree for the complainant; and his decree is now assigned as error by the defendants.

SOMMERVILLE, J.—The lands in controversy are a portion of those granted to the State of Alabama by the act of Congress approved June 3, 1856, (11 U. S. Statute at Large, pp. 17 and 18), to aid in the construction of certain railroads in the State. This grant was renewed by another act of Congress, approved April 10, 1869, found in 16 U. S. Statutes at Large, pp. 45 and 46.

We have often decided, that the legal title of so much of these lands as had not been previously sold in accordance with the foregoing acts of Congress, and in the manner prescribed by them, became vested in the appellants, Swann and Billups, as trustees, by the deed of the State of Alabama made to them, under authority of law, on February 8, 1877.—

Standifer vs. Swann and Billups, 78 Ala. 88; *Swann and Billups vs. Lindsey*, 70 Ala. 507. This fact is admitted by the complainant's bill in this case, the purpose of which is to compel a conveyance to him, by these parties, of the legal title to a tract of two hundred acres of these lands, upon the alleged ground that he is the *bona fide* purchaser and lawful owner of the equitable title, and is entitled to a conveyance of the legal title, upon settled principles of specific performance.

The title of the complainant, Miller, can be no better than that of Bagley, from whom he claims by various intermediate conveyances, and who derived whatever interest he had through two executory contracts of conveyance, made by one Duffy, professing to act as the authorized agent of the Alabama & Chattanooga Railroad Company; the one of these contracts being made on September 13, 1870, and having reference to one hundred and sixty acres of this land, exempting certain mineral rights reserved; and the other bearing date January 24, 1871, bargaining for the release of these reserved rights, and a sale of other forty acres of the land. The inquiry then is, did Bagley have an equitable title to these lands, by virtue of these contracts of sale, thus made with Duffy at the dates specified?

The testimony fails to show that Duffy had any written authority from the railroad company, to act as its agent in making these sales; nor is it shown that there ever was any vote of the board of directors, or any minute made of the corporate proceedings of this road, evidencing the appointment of Duffy as such agent. The contracts of conveyance were, therefore, invalid, and of no legal effect in themselves. This was decided by us in the case of *Standifer vs. Swann and Billups*, 78 Ala. 88; and re-affirmed in *Ware vs. Swann and Billups*, at the last term, 79 Ala. 330.

This difficulty is sought to be obviated by the contention, that Duffy held himself out publicly as the agent of the railroad, and made these sales, receiving from Bagley, the vendee, a part of the purchase-money, and taking his notes for the balance; that the money went into the treasury of this corporation, and the officials of the company received the notes, and asserted ownership of them, with a full knowledge of the facts attending the transaction. It is argued that this was a ratification of Duffy's agency, and an adoption of his acts of sale, which would be binding as an equitable estoppel on the railroad company in its corporate capacity.

It is answered by the defendants, among other things, that, under the facts stated in the bill, these alleged contracts of sale—made, as we have said, respectively, on September 13, 1870, and January 24, 1871—were *in violation of the act of Congress* making the grant of these lands to the State, and were for this reason null and void, conveying, as is insisted, no title whatever to Bagley.

The position seems to us undeniable, that the burden is cast on the appellee, of averring and proving every material fact necessary to establish the validity of the alleged sales made to Bagley. In asking the Court for affirmative relief, which could not be granted unless complainant's title was good, and he having only Bagley's title, it is but reasonable to require of him satisfactory evidence of the fact that these sales were made in the manner, under the conditions, and at the times prescribed by the law regulating these matters. Compliance with the terms of the act authorizing the sales, is a necessary condition precedent to their validity.

It is a material fact, that these contracts of sale between Duffy and Bagley were made before the completion of the Alabama & Chattanooga Railroad—an event which is shown

not to have transpired until May 17, 1871. This being so, they could be valid only under one or two conditions or states of facts: 1st, the lands sold must have been embraced in the first one hundred and twenty sections, which the State, by the terms of the grant from Congress, had the power to sell, in order to commence the construction of the first twenty miles of the road; or, 2d, the mode and time of sale prescribed by section 4 of the original grant of June 3, 1856, must have been complied with in every essential, its terms having been unchanged by the later act of April 10, 1869, renewing the grant, save in certain particulars not affecting the questions before us for decision. These two propositions are manifest from the most casual inspection of these statutes—11 U. S. Stat. at Large, pp. 17-18; 16 U. S. Stat. at Large, pp. 45–46; *Schulenburg vs. Harriman*, 21 Wall. 44, 57; *Swann and Billups vs. Lindsey*, 70 Ala. 507; *Swann and Billups vs. Larmore*, 70 Ala. 555.

It is shown by the Record, that the lands in controversy were not embraced in the first one hundred and twenty sections, which were authorized to be sold in order to construct the first twenty miles of the Alabama & Chattanooga road, which succeeded to the rights accorded to two of the roads mentioned in the original grant. The only remaining inquiry then is, whether the power of sale, conceding it to have been executed under the authority of this corporation, was in accordance with the provisions of section 4 of the act of June 3, 1856, as renewed by the act of April 10, 1869; for, as said by the United States Supreme Court in *Schulenburg vs. Harriman*, 21 Wall. 44, 59, where an act substantially similar was construed, "No conveyance in violation of the terms of of those acts, the road not having been constructed, could pass any title.

Section 4 of this act reads as follows: "That the lands hereby granted to the said State shall be disposed of by said State *only in the manner following*, that is to say: that a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included in a continuous length of twenty miles of each of said roads, may be sold; and *when the Governor of said State shall certify to the Secretary of the Interior* that any twenty continuous miles of any of said roads is completed, *then* another quantity of land, hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a length of twenty miles of each of said roads, *may be sold*; *and so, from time to time until said roads are completed*; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall *revert* to the United States." This section is unchanged by the reviving act of April 10, 1869, except that three additional years are allowed for the completion of the road. The second section of the same act of 1856 made the lands subject to the disposal of the Legislature; but the first section limited this right, by declaring that they could be disposed of only *as the work progressed*.—11 U. S. Stat. at Large, pp. 17–18.

It was, of course, beyond the power of the Legislature to infringe the provisions of this law. Nor has that body attempted to do this. The act of February 11, 2870, enacted by our General Assembly, under the authority of which the Alabama & Chattanooga Railroad Company executed a mortgage to the State of Alabama, bearing date March 2d, 1870, provided that the company, while yet a mortgagor, should have "the privilege and right of selling said lands, or any part thereof, *in accordance with the act of Congress* granting

the same;" the proceeds of sale to be appropriated to the payment of the mortgage debt due by the company.—Acts 1869-70, pp. 89–92.

There is neither allegation nor proof that the requirements of section 4 of the act of 1856 had been complied with, in such manner at to authorize these alleged contracts of sale, or, in fact, in any manner at all, at the times the sales are claimed to have been made, which, as before stated, was before the completion of the road. After the sale of the first one hundred and twenty sections, the effect of this section, taken in connection with section 1 of the same act, was, as said by the United States Supreme Court, in *Schulenberg vs. Harriman*, 21 Wall. 59, to make it a "condition precedent to the conveyance by the State of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles." And the evidence of this fact, as prescribed by this act, is the official certificate of the Governor of the State, to the Secretary of the Interior, at Washington. The State itself being thus prohibited, by the terms of the act, from making the sales at the time they were made, the railroad company, and all persons acting under its authority, were equally prohibited from doing the same thing. It can scarcely be contended, that a sale made in contravention of the letter and policy of the law is merely voidable. It can not be other than void *ab initio*.

It is no answer to this conclusion, that the effect of such an illegal sale would be only to forfeit the grant, and that as a ground of forfeiture it was a condition subsequent, of which no one else than the United States could claim the benefit. The rule undoubtedly is, that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor, his heirs, or successors; and the

government is bound by this principle. But the act of Congress conferring title to these lands was not a mere grant. It was a *law*, as well as a grant. Nor is it contended that anything done by the State, or by the railroad company, has operated, *ipso facto* to forfeit the title to the lands, or divest it out of either of these grantors, so as to vest it again in the United States. The contention of appellants' counsel is, that no title passed to Bagley, under or by virtue of these attempted sales, because they were in violation of the letter and policy of *the law* which authorized the grant. No question of forfeiture is thus raised by the Record.

It is said further, that the title of Bagley has been confirmed by subsequent legislation of the General Assembly bearing on this subject. These laws go no further than to protect the titles, legal and equitable, of all *bona fide* purchasers of these lands, lawfully acquired under conveyance, or contract of conveyance, made in accordance with the terms of the foregoing acts of Congress.—Acts 1875-76, p. 145, § 19; Acts 1880-81, p. 101, § 1; *Standifer vs. Swann and Billups*, 78 Ala. 88. No sale made in violation of law can be said to be *bona fide*, nor are the claims of a *mala fide* purchaser intended to be protected by these statutes.

The contracts of sale, being void for illegality, were incapable of ratification. Only that which is voidable can be ratified, in any proper sense of the word, not that which is absolutely void.

These conclusions are sufficient, without the consideration of other questions, to authorize the reversal of the decree in this cause. The bill was without equity, and the chancellor erred in not so holding.

Reversed and remanded.

Office Supreme Court U. S.
FILED.
OCT 23 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

Case No. 14,435 Term No. 362

REUBEN B. MILLER, EXECUTOR, ET AL.

vs.

JOHN SWANN AND JOHN A. BILLUPS,
TRUSTEES, AND OTHERS.

In Error from the Supreme Court of Alabama.

MOTION TO REVIVE, ETC.

Comes the plaintiffs in error, by their attorney, and show to the Court that John A. Billups, Trustee, one of the defendants in error in the above entitled cause, departed this life on the 4th day of April, 1893, and that the Governor of the State of Alabama, under the authority of "The Debt Settlement Act," approved February 28, 1876 (Acts of Alabama, 1875-6, pages 130-149), appointed as his successor William J. Cameron of Birmingham, Alabama, on the 24th day of June, 1893, who has accepted said appointment and duly qualified as such trustee. They, therefore, move that said William J. Cameron, successor as aforesaid, be made a party defendant in the place of John A. Billups, deceased, and that citation issue to him, in accordance with the rules and practices of the Supreme Court.

ELLIS PHELAN,

Attorney for Plaintiffs in Error.